TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 658

PAUL SENN, APPELLANT,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5, CHARLES SCHREIBER, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED JANUARY 16, 1937.

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[fol. 1] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

PAUL SENN, Appellant,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL NO. 5, CHARLES SCHREIBER, Tile Layers Helpers Union, Local No. 47, and Herbert Sebastian, Appellees

ORDER ALLOWING APPEAL—Filed December 7, 1936

The appellant in the above entitled suit having prayed for the allowance of an appeal in the above entitled cause to the Supreme Court of the United States from a judgment made and entered in the above entitled suit in the Supreme Court of the State of Wisconsin on the 29th day of June, 1936, a motion for re-hearing having been denied by the Supreme Court of the State of Wisconsin on the 15th day of September, 1936, and from each and every part thereof, and having presented and filed his petition for appeal, assignment of errors, prayer for reversal and statement pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It Is Hereby Ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Wisconsin in the above entitled cause as provided by law, and

It Is Further Ordered that the Clerk of the Supreme Court of the State of Wisconsin shall prepare and certify [fol. 2] a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said court in accordance with the rules of the Supreme Court of the United States.

It Is Further Ordered that security for costs on appeal be fixed in the sum of Five Hundred and 00/100 ($500.00) Dollars.

Dated this 7th day of December, 1936.

Marvin B. Rosenberry, Chief Justice of the Supreme Court of the State of Wisconsin. (Seal Supreme Court of Wisconsin.)

[fol. 3] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed December 7, 1936

Considering himself aggrieved by the final decision of the Supreme Court of the State of Wisconsin in the above entitled cause, the appellant herein prays that an appeal be allowed to the Supreme Court of the United States herein and for an order fixing the amount of the bond thereon.

ASSIGNMENT OF ERRORS

Now comes the above named appellant and in filing herewith his petition for appeal says that there are errors in the records and proceedings in the above entitled cause, and, for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment of errors:

1. Said Supreme Court of the State of Wisconsin erred in rendering judgment affirming the judgment of the Circuit Court of Milwaukee County, Wisconsin, in holding [fol. 4] the Wisconsin Statutes of 1935, Sections 103.51 to 103.63, as construed by said Circuit Court of Milwaukee County, Wisconsin, in this cause, to be a constitutional and valid act not in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that such construction deprived appellant of liberty or property without due process of law, and denied to appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws.

2. Said Supreme Court of the State of Wisconsin erred in failing to render judgment in favor of the appellant and thus reversing the judgment of the Circuit Court of Milwaukee County, Wisconsin, and in refusing, by failing to reverse said judgment of the Circuit Court of Milwaukee County, Wisconsin, to grant the relief prayed for by the appellant, for the reason that the refusal of the Supreme Court of the State of Wisconsin to so reverse said judgment of the Circuit Court of Milwaukee County, Wisconsin, was based upon a construction of said Wisconsin Statutes of 1935, Sections 103.51 to 103.63, as applied to this

cause, holding said statutes constitutional and valid, for the reason that such construction of said statutes is in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that such construction of said statutes deprived the appellant of liberty or property without due process of law and denied to appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws.

[fol. 5] 3. Said Supreme Court of the State of Wisconsin erred in granting judgment affirming the judgment of the Circuit Court of Milwaukee County, Wisconsin, because by the affirmance of said judgment of the Circuit Court of Milwaukee County, Wisconsin, the judgment of the Supreme Court of the State of Wisconsin operated as a judicial decision to deprive the appellant of liberty or property without due process of law and denied to the appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, for the reason that the judgment of the Supreme Court of the State of Wisconsin affirming the judgment of the Circuit Court of Milwaukee County operated as a denial to the appellant of a judicial remedy for the protection of appellant's rights of liberty and property and the equal protection of the laws under Section 1 of the Fourteenth Amendment to the Constitution of the United States in that said judgment of the Supreme Court of the State of Wisconsin deprived appellant of a judicial remedy for the protection of such rights and was, in effect, a taking of liberty or property from the appellant without due process of law and a denial to the appellant, a person within the jurisdiction of the State of Wisconsin, of the equal protection of the laws under said Section 1 of the Fourteenth Amendment to the Constitution of the United States.

4. Said Supreme Court of the State of Wisconsin erred in failing to render judgment reversing the judgment of [fol. 6] the Circuit Court of Milwaukee County, Wisconsin, in that the refusal of the Supreme Court of the State of Wisconsin to so reverse the judgment of the Circuit Court of Milwaukee County, Wisconsin, and the refusal of the Supreme Court of the State of Wisconsin to order,

by such reversal, the said Circuit Court of Milwaukee County, Wisconsin, to grant appellant the relief prayed for was a judicial act depriving appellant of liberty or property without due process of law and denying to appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and such refusal of the Supreme Court of the State of Wisconsin to reverse said judgment of the Circuit Court of Milwaukee County, Wisconsin, in effect denied to the appellant a judicial remedy for the protection of his rights under said Section 1 of the Fourteenth Amendment to the Constitution of the United States.

5. Said Supreme Court of the State of Wisconsin erred in affirming the judgment of the Circuit Court of Milwaukee County, Wisconsin, and thus holding said Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, formerly Sections 268.18 to 268.30 of the Wisconsin Statutes of 1933, as construed by said Supreme Court of the State of Wisconsin in this cause, constitutional and valid in that they did not deprive the appellant of liberty or property without due process of law and did not deny the appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws.

[fol. 7] 6. Said Supreme Court of the State of Wisconsin erred in rendering judgment refusing to hold Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, formerly Sections 268.18 to 268.30 of the Wisconsin Statutes of 1933, invalid and in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the State of Wisconsin, for the reason that the judicial construction of said sections, as construed by said Supreme Court of the State of Wisconsin, conferring a legal right upon the appellees to engage in the conduct against the appellant complained of, operated to deprive appellant herein of liberty or property without due process of law and to deny to the appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

7. Said Supreme Court of the State of Wisconsin erred in affirming the judgment of the Circuit Court of Milwaukee

County, Wisconsin, for the reason that the judgment of the Supreme Court of the State of Wisconsin operated as a judicial decision depriving the appellant of liberty or property without due process of law and denying to the appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fol. 8] PRAYER FOR REVERSAL

For which errors the appellant, Paul Senn, prays that the said judgment of the Supreme Court of the State of Wisconsin, rendered June 29, 1936, and on which a motion for re-hearing was denied on the 15th day of September, 1936, in the above entitled cause, be reviewed by the Supreme Court of the United States and reversed, and a judgment rendered in favor of the appellant for costs.

Dated this 7th day of December, 1936.

Leon B. Lamfrom, Attorney for Appellant.

[fols. 9-46] [File endorsement omitted]

[fols. 47-49] Bond on Appeal for $500.00, approved and filed December 7, 1936, omitted in printing.

[fols. 50-54] Citation, in usual form, showing service on Joseph A. Padway, filed December 11, 1936, omitted in printing.

[fol. 55] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed January 4, 1937

To Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin;

You are Hereby Requested to make a transcript of the record to be filed in the Supreme Court of the United States

by reason of an appeal allowed from the judgment rendered by the Supreme Court of Wisconsin in this cause.

It is Hereby Stipulated by and between the parties to this cause, by their respective attorneys, that the following portions of the record shall be included in said transcript:

1. Pleadings—pp. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20.
2. Decision—pp. 22-23.
3. Findings of Fact and Conclusions of Law—pp. 24-30.
4. Judgment Appealed From—pp. 32-33.
5. Bill of Exceptions:

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[fol. 56] Lines 8, 9, 10, 11 on page 48
Lines 18, 19, 20, 21, 22 on page 49
First 10 lines and last 5 lines on page 50
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Lines 1, 2, 3, 4, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 on page 52
Lines 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 on page 53
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Last 16 lines on page 66
First 8 lines on page 67
Last 24 lines on page 68
Last 5 lines on page 69
pp. 70, 71, 72
First 23 and last 2 lines on page 73
First 20 lines on page 74
Last 11 lines on page 75
pp. 76, 77, 78, 79, 80, 81, 82
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Last 22 lines on page 84
Last 23 lines on page 87
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6. Plaintiff's Exhibits 1 and 7.
7. Defendants' Exhibit 3.

Dated this 30th day of December, 1936.

Leon B. Lamfrom, Attorney for Appellant. Joseph A. Padway, Attorney for Appellees.

[fol. 60] [Caption omitted]

[fol. 61] IN CIRCUIT COURT OF MILWAUKEE COUNTY

Case No. 148674

PAUL SENN, Plaintiff,

vs.

TITLE LAYERS PROTECTIVE UNION, LOCAL NO. 5, CHARLES SCHREIBER, Tile Layers Helpers Union, Local No. 47, and Herbert Sebastian, Defendants

NOTICE OF APPEAL—Filed April 10, 1936

To Jas. L. McCormack, Clerk of the Circuit Court of Milwaukee County, Wisconsin; Joseph A. Padway, 212 West Wisconsin Avenue, Milwaukee, Wisconsin, attorney for defendants.

Please Take Notice that Paul Senn, plaintiff in the above entitled action, hereby appeals to the Supreme Court of the State of Wisconsin from that certain judgment entered and docketed in the above entitled action in the Circuit Court of Milwaukee County on the 3rd day of April, 1936, and from the whole thereof, wherein and whereby it was adjudged and decreed that the complaint of the plaintiff be dismissed on the merits, without costs.

Dated this 9th day of April, 1936.

Lamfrom, Tighe, Engelhard & Peck, Attorneys for Plaintiff.

[File endorsements omitted.]

[fol. 62] Copy Received Apr. 10, 1936. Jos. A. Padway, Attorney.

Service admitted this 10th day of April 1936. Jas. L. McCormack, Clerk of Circuit Court, Milwaukee County, Wis., by Rhea F. Butzke, Deputy Clerk.

Lamfrom, Tighe, Engelhard & Peck, Attorneys and Counselors at Law, 208 East Wisconsin Avenue, Milwaukee, Wis., Attorneys for Plaintiff.

[fols. 63-67] Bond on appeal for $250.00, approved and filed April 11, 1936, omitted in printing.

[fol. 68] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

ORDER TO SHOW CAUSE—Filed December 28, 1935

On reading and filing the verified complaint herein and on motion of plaintiff,

It Is Hereby Ordered that the above named defendants show cause, if any they have, before the Honorable John J. Gregory, Calendar Judge of the Circuit Court of Milwaukee County, in his courtroom on the fifth floor of the Milwaukee County Courthouse, on the 30 day of December, 1935, at 9 o'clock A. M. on said day, or as soon thereafter as counsel can be heard, why a temporary injunction should not be issued enjoining and restraining the defendants, and each of them, and all persons acting in cooperation with them, from in any wise picketing the premises of the plaintiff and why they should not be likewise restrained and enjoined from representing or stating in any manner whatsoever that the plaintiff is unfair in his dealings with the defendants and why they should not be restrained and enjoined from picketing the premises of owners, contractors or architects or any other persons who engage the plaintiff as subcontractor or transact any business with the plaintiff or who wish to deal with the plaintiff, and why, in addition, the defendants should not be restrained and enjoined from doing those acts and things set forth in the prayer in the complaint for a temporary injunction.

[fol. 69] It Is Further Ordered that the hearing of this order to show cause be upon testimony of witnesses in open court at said time and place, at which time said defendants may appear and have an opportunity to cross examine the witnesses of the plaintiff herein and to offer opposition thereto.

Let a copy of this order be served upon the defendants at least forty-eight (48) hours prior to the time set for said hearing.

Dated this 27th day of December, 1935.

John J. Gregory, Circuit Judge.

[fol. 70] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

SUMMONS—Filed December 28, 1935

State of Wisconsin, to the said defendants and each of them:

You Are Hereby Summoned to appear within twenty (20) days after the service of this Summons, exclusive of the day of service, and defend the above entitled action in the Court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the Complaint, of which a copy is herewith served upon you.

Lamfrom, Tighe, Engelhard & Peck, Attorneys for Plaintiff, Post Office Address: 1416-1427 Bankers Building, 208 E. Wisconsin Avenue, Milwaukee, Wisconsin.

[fol. 71] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

PAUL SENN, Plaintiff,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL NO. 5, CHARLES SCHREIBER, Tile Layers Helpers Union, Local No. 47, and Herbert Sebastian, Defendants.

COMPLAINT—Filed December 28, 1935

Now comes the plaintiff by Lamfrom Tighe Engelhard & Peck, his attorneys, and for cause of action alleges as follows:

1. That at all times hereinafter mentioned the plaintiff is, and was, a resident of the City and County of Milwaukee, State of Wisconsin, residing at 3162 North First Street, in said City, and that his occupation is that of tile setter and tile contractor under the firm name of Paul Senn & Co.

2. That the defendant Tile Layers Protective Union, Local No. 5, and the defendant Tile Layers Helpers Union, Local No. 47, each was and is at all times hereinafter mentioned a voluntary unincorporated association of individuals and each was and is what is commonly known as a trade union; that the business of each is that usually carried on by trade unions and that the business address of the defendant Tile Layers Protective Union, Local No. 5, is 2904 North 47th Street, Milwaukee, Wisconsin, and the business address of the defendant Tile Layers Helpers Union, Local No. 47, is 3800 North 7th Street, Milwaukee, Wisconsin.

3. That the defendant Charles Schreiber is the business agent of said Tile Layers Protective Union, Local No. 5, and is by occupation a tile setter and resides at 2904 North 47th Street, Milwaukee, Wisconsin.

[fol. 72] 4. That the defendant Herbert Sebastian is the business agent of said Tile Layers Helpers Union, Local No. 47, and is by occupation a tile layer's helper and resides at 3800 North 7th Street, Milwaukee, Wisconsin.

5. That this action is brought against all of the members of said local union No. 5 and the members of said local union No. 47 and against the agents, employees and representatives of said local union No. 5 and local union No. 47, and this suit is brought against the said locals in their own names and against Charles Schreiber and Herbert Sebastian as officers and representatives of all of the members of said locals, their agents, employees and representatives, for the reason that it is impracticable to join the individual members of said local unions because of their large numbers.

6. That the plaintiff has been for approximately four (4) years and is presently conducting the business of a tile contractor from his residence at 3162 North First Street in the City of Milwaukee, and that in connection with the said business of tile contractor he rents a show room at 4738 West Lisbon Avenue, in the City of Milwaukee, wherein he has on display samples of tile. That the plaintiff customarily employes one tile layer and one helper, depending upon the amount of work he has contracted to do at a given time; that the plaintiff, in fulfilling his con-

tracts for the setting of tile, works with his tools and hands either as a tile layer or tile layer's helper, applying his skill, knowledge and energy in the same manner as though he were an employee working for someone else instead of being a self-employer; that plaintiff has invested approximately Sev[illegible] Hundred ($700.00) Dollars in tools, equipment and supplies and that he has an annual overhead for [fol. 73] rent, telephone, heat, operation of motor vehicles and other incidentals, of approximately Six Hundred ($600.00) Dollars; that during 1935 the plaintiff netted approximately Fifteen Hundred ($1500.00) Dollars on contracts performed by him and his employees. That the plaintiff, together with his wife and four (4) children, have as their sole source of income the business and occupation of the plaintiff; that during the year 1935 the plaintiff worked as a tile setter and helper approximately seven hundred fifty (750) hours in addition to the time and energy that he put into his business in bidding on contracts and in engaging in such activities as a contractor would engage in who was not a self-employer; that the net income for the year 1935 of Fifteen Hundred ($1500.00) Dollars reflects approximately Seven Hundred Fifty ($750.00) Dollars which the plaintiff earned by laboring directly with his tools and hands in the performance of contracts.

7. That the plaintiff in the majority of cases is a subcontractor to the principal contractor and that as such subcontractor he and his men install the tile in bath rooms of homes or install tile in any buildings requiring that kind of installation.

8. That none of the employees of the plaintiff are members of either of the said defendant unions; that no contractual relation of any kind exists between the plaintiff and the defendant unions; that the defendant unions have not been designated by any of the plaintiff's employees as their agent for collective bargaining or for any other purpose.

9. That between March 14, 1935, and December 6, 1935, the business agents and other representatives of the defendant unions have demanded of the plaintiff that he enter [fol. 74] into a contract with their respective unions by the terms of which the plaintiff was to employ only members of their respective unions and under such terms and con-

ditions as are commonly known as union wages, hours and working conditions; that in addition to the above demands the said unions through their representatives demanded of the plaintiff that he refrain entirely from engaging in any work as a tile layer or helper in the performance of any of his contracts and that he should under no circumstances use his tools or act as a helper in the installation of any of the materials customarily set or laid by a tile layer and his helper; that the plaintiff was at all times ready, willing and able to agree with the defendant unions to all the terms of the proposed contracts submitted to the plaintiff except that provision which required the plaintiff to desist from engaging personally in his trade as a tile setter or as helper and that the plaintiff at all times stated to the representatives of the defendant unions that he could not and would not agree not to work at his trade in the performance of contracts he obtained either as principal contractor or as subcontractor but that he was ready, able and willing to agree to all other provisions of their proposed contracts.

10. That because of the plaintiff's persistent refusal to give up his right to work as a means of a livelihood the defendant unions entered into a conspiracy to unlawfully and maliciously molest, harrass and harm the plaintiff by diverse means so as to force him against his will either to acceed to the demand that he stop engaging in his trade of tile layer or helper or to ruin him in his business and trade; that pursuant to said conspiracy the defendants caused the residence of the plaintiff to be picketed almost daily since December 6, 1935, the pickets varying in numbers from two to four, and have likewise caused the plain-
[fol. 75] tiff to be pursued upon the highways of the City of Milwaukee by pickets for the purpose of discovering where plaintiff and his men were at the time performing the work of installing tile; that as a result of the defendants conduct, through their agents, employees and members, the plaintiff has endured the harrassment, molestation and interference incident to having his home picketed and bannered and that the plaintiff has been put to the continuous trouble of dodging his pursuers in order to conceal from them where he and his men were performing their work so as to avoid the picketing by the defendants at such premises at which the plaintiff and his men were at work.

11. That the defendants, as part of their conspiracy directed towards this plaintiff, have threatened to picket the premises of the owners and the offices of contractors and of architects who let work to this plaintiff unless this plaintiff acceeds to the demand of the defendants that the plaintiff perform no personal work in the execution of his contracts as aforesaid.

12. That the activities of the defendants thus far and the threatened continued activities of the defendants have caused and will cause the plaintiff irreparable injury for which there is no adequate remedy at law and that unless the said defendants are not restrained by an injunction from this court, this plaintiff will be denied his right to earn his living by the exercise of his skill and energy as a worker.

13. That the defendants willfully, maliciously and unlawfully are engaging in concerted action to ruin this plaintiff in his trade and business for the sole purpose of forcing this plaintiff against his will to agree with the defendants not to work with his tools and his hands at his trade, all in violation of Section 343.681.

[fol. 76] 14. Plaintiff alleges that he is not seeking relief by injunction in a case involving or growing out of a labor dispute but alleges that he is applying to the court for relief on the sole ground that the defendant unions, their members, servants, employees, associates and sympathizers are conducting illegal picketing and threaten further illegal picketing and are otherwise engaged in illegal conduct, all in violation of Section 343.681 of the Statutes, and plaintiff alleges that the provisions of Section 268.18 to 268.30 of the Statutes of 1933 are not invoked by this plaintiff for the reason that as plaintiff is informed and believes, there is neither in fact nor in law a labor dispute in existence between the plaintiff and the defendants but that the defendants are engaging in an arbitrary, unlawful and malicious interference with the business and property rights of this plaintiff.

Wherefore, plaintiff prays:

(a) That the defendants be required to show cause, if any they have, why plaintiff should not have a temporary injunction enjoining the defendant unions, their members, servants, employees, sympathizers and associates from do-

ing any act whatever which directly or indirectly interferes with the conduct of the plaintiff's business or the conduct of the plaintiff's trade, business and other pursuits and that in particular the defendants be enjoined from publishing, stating or proclaiming that the plaintiff is unfair to organized labor or to the defendant unions, and, from doing any act or thing which in any manner would have a tendency to persuade any contractors, owners or architects to refuse to deal with this plaintiff as a tile contractor or to refuse to deal with the plaintiff for the purpose of transacting any other business; and from interfering with the plaintiff and his family's peaceful occupancy of their home.

[fol. 77] (b) That the said defendants, their agents, confederates, servants, employees, members and sympathizers be restrained by a permanent injunction from attempting in any manner to coerce this plaintiff not to engage his hands or tools in the work of tile layer or helper; from in any wise attempting to molest, intimidate or coerce any of the contractors, architects, owners or other persons seeking to transact business with the plaintiff; from coercing by any act whatsoever the plaintiff to do any act against his will; and from representing or stating that the plaintiff is unfair to organized labor or in his dealings with his employees, with the defendants or any other person; and from interfering in any unlawful manner with any person or persons who wish to deal with the plaintiff and who wish to continue their employment with the plaintiff; and from interfering in any unlawful manner with the plaintiff and the family of the plaintiff at his residence or any where else where the plaintiff and his family may lawfully be.

(c) That the defendants be decreed to pay the costs of this suit and that the plaintiff be given such other and further relief as may be just and equitable in the premises.

Lamfrom Tighe Engelhard & Peck, Attorneys for Plaintiff.

[fol. 78] *Duly sworn to by Paul Senn. Jurat omitted in printing.*

[fol. 79] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

ANSWER—Filed January 14, 1936

The defendants above named, by Joseph A. Padway, their attorney, answering plaintiff's complaint, admit, deny and allege as follows:

1. Admit the residence of plaintiff and that he is a tile contractor under the firm name of "Paul Senn & Company", but deny that he is a practical tile setter.

2. Admit the allegations set forth in paragraph 2.

3. Admit the allegations set forth in paragraph 3.

4. Admit the allegations set forth in paragraph 4.

5. Admit the allegations set forth in paragraph 5.

6. In answer to paragraph 6, allege the following:

(a) That plaintiff has held himself out as a tile contractor and conducted his business in connection with his residence at 3162 North First Street, in the City of Milwaukee; that he also maintains a show room at 4738 West Lisbon Avenue.

(b) Denies knowledge as to how many employees plaintiff customarily employs in his tile contracting business, but alleges that he does employ tile layers and tile helpers in connection with his business as tile contractor.

(c) Admits that the plaintiff works with the tools of the tile laying trade both as a tile layer and a tile layer's [fol. 80] helper, but in that connection alleges that he is not a practical tile setter nor recognized as possessing the qualifications for a helper to aid journeymen tile layers, nor does he possess the qualifications of a journeyman tile helper as prescribed by the Constitution and Rules of Order governing the defendant Unions or as is generally and customarily recognized in the tile laying industry.

(d) Denies knowledge or information on which to base the belief as to the investments of the plaintiff in his tile business.

(e) Denies knowledge of the specified items and facts alleged by the plaintiff in said paragraph 6.

7. In answer to paragraph 7, defendants allege that the plaintiff has held and does hold himself out as a general tile contractor, engaged in the tile contracting business, and holds out the location of said business to be at 3162 North First Street, in the City and County of Milwaukee, State of Wisconsin.

8. Admit the allegations contained in paragraph 8 of the complaint.

9. In answer to paragraph 9, defendants allege that for some time and prior to March 14, 1935, and since that time they have been engaged in an effort to unionize the tile industry for the purpose of regulating their wages and their hours and conditions of labor, the protection of their individual rights, and the prosecution of their trade, having in view their mutual protection and benefit; that at some time prior to December 6, 1935, the defendants negotiated with a number of tile contractors in the City and County of Milwaukee for the purpose of securing a collective agreement governing their wages, hours and working [fol. 81] conditions as craftsmen in the tile laying industry. That as a result of said negotiations, an agreement was entered into by a number of tile contractors in the City and County of Milwaukee and the defendants, governing wages, hours and working conditions in the industry; that all of the contractors who have entered into said agreement with the defendant Unions are known in the trade and industry as Union contractors, and that all contractors who have refused to enter into said agreement are known in the trade and industry as non-Union contractors.

10. That non-Union contractors conduct their business and their relationships with their employees in such a manner as tends to and does affect the interests and welfare of the defendants and their members to their detriment.

11. That the tile industry for several years last past has been in a demoralized state because of a lack of building operations; that the defendants and their members have been in competition with non-Union tile setters and helpers in the economic struggle for work as a means of livelihood.

12. That by virtue of the depressed condition of the industry and as a means of affording the defendants and their members employment and a livelihood, they have found it necessary for the protection of their individual rights in the prosecution of their trade to require of all employers desiring to conduct a Union shop to agree:

"that no individual, member of a partnership or corporation engaged in the tile contracting business shall work with the tools or act as helper, but that the installation of all materials within the classification of tile work shall be done by journeymen members of the Tile Layers' Protective Union."

[fol. 82] 13. That the defendants, by their representatives, have repeatedly offered to accept the plaintiff as a Union contractor and have made such offer to him prior to the signing of the agreement with the contractors, who have signed the same; and the defendants have offered to the plaintiff the opportunity to discuss and negotiate respecting an agreement prior to the signing of the agreement with the Union contractors as afore referred to. That plaintiff has persistently refused to consider any proposed agreement or sign any agreement, which will contain as a condition that he shall not work with the tools of the trade or employ himself in the recognized capacity of helper within the trade. That the plaintiff, prior to the making of the agreement with the Union contractors as afore referred to and since the making of said agreement, has conducted his establishment in a manner violative of the recognized trade principles of the defendants and their members. That the plaintiff has himself worked at the trade, although he is not a practical tile setter within the rules described by the defendant Unions or known and recognized within the industry. That the plaintiff has secured Union help and employed the same in his non-Union business with knowledge that the same was contrary to Union rules. That he has encouraged Union employees to violate Union rules and thereby lose their membership in the Union. That he has employed himself and others for hours longer than those prescribed by the Union and considered by the Union as beneficial to their craft and trade. That he has employed himself and others on Sunday and holidays upon terms and conditions contrary to those pre-

scribed by the Union and which the Union considers highly detrimental to the welfare of its members in the industry. That the plaintiff has refused to sign said agreement, unless [fol. 83] certain employees, whom he designated by name, were taken into the Union and permitted to work for him. That the Union advised plaintiff that it could not agree to accept said individual as a member of the Union because said person had been guilty of violating Union rules while a member of said Union.

14. That in order for a tile contractor to be accepted by the defendant Union as a Union contractor, he is required to abide by certain recognized terms and conditions established by the Unions for the protection of their individual rights in the prosecution of their trade.

15. That among said rules, as a condition of transacting business with a contractor as a Union contractor, the defendant Unions and their International prescribe among other things the following:

"Article XX

Section 6. Members of the I. U. shall not accept employment with a contractor who works with the tools of the trade unless said contractor is a practical • • • tile setter, • • •."

16. That the constitution and by-laws of the Tile Layers' Protective Union Local No. 5 of Milwaukee, Wisconsin, provide:

"Section 29. No member shall be allowed to work in a shop or on a job with an expelled or suspended member of this Union."

"Section 30. Members shall not accept employment with a contractor who works with the tools of the trade unless said contractor is a practical tile setter."

"Section 38. Members will not allow helpers to do any of the mechanics work. Helpers work will consist of the mixing and carrying of all mortar, unpacking all tile, etc. The cutting and setting of tile and the washing and grouting will also be conceded to the helper."

17. That the defendants cannot accept the plaintiff as a Union contractor because of his demand that the Union accept as a member the employee designated by him, for to

do so would violate Section 29 of the constitution afore referred to. That the defendants cannot accept the plain-
[fol. 84] tiff as a Union contractor because he refuses to abide by Section 6 of Article XX of the International Union's constitution and of Section 30 of the Local constitution. That the defendants cannot accept the plaintiff as a Union contractor because he refuses to accept the conditions set forth in Section 38 governing helpers.

18. That the defendants desire that the industry be unionized and that the plaintiff unionize his plant, but that the defendants find it is necessary for the protection of their craft, the promotion of their welfare and the protection of their individual rights in the prosecution of their trade or trades, that the industry grant to the defendants and their members the wages prescribed by the defendants, the schedule pertaining to the payment of overtime work, and that distinction between contractors and journeymen be maintained, and that persons desiring to work as journeymen and helpers in the tile laying industry acquire their practical knowledge and skill in the trade through apprenticeship and other technical training as provided in Article XVI of the International constitution governing the trade and industry. That among the purposes for which the defendants are organized is to maintain,

"carry on labor Unions • • • for the purpose of aiding their members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character;"

That Article 3 of the constitution and by-laws of the Tile Layers' Protective Union Local No. 5, Milwaukee, Wisconsin, provides among other things:

"The object of this Union is to encourage a higher standard of skill, to cultivate feelings of friendship among the men of our craft, to assist each other to procure employment, to reduce the hours of daily labor, to secure adequate pay for our work, and by legal and proper means to elevate the legal, moral, intellectual and social conditions of our members."

[fol. 85] 19. Answering paragraph 10, defendants deny that they have entered into any conspiracy or unlawful or malicious conduct.

20. Defendants admit that in order to induce the plaintiff to conduct a Union shop upon terms and conditions prescribed by said Union and which plaintiff has steadfastly refused to do, they and their members have sought to bring economic pressure on the plaintiff by engaging in peaceful picketing and peaceful persuasion as permitted and prescribed by law. Defendants deny that they are engaged in any unlawful conduct.

21. Further answering plaintiff's complaint, defendants deny each and every matter of fact and thing not hereinbefore specifically admitted, denied or qualified.

Wherefore, defendants demand that plaintiff's complaint be dismissed with costs.

Joseph A. Padway, Defendants' Attorney.

Duly sworn to by F. W. Melville, Sr. Jurat omitted in printing.

[fol. 86] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

Case No. 148-674

PAUL SENN, Plaintiff,

vs.

TITLE LAYERS' PROTECTIVE UNION LOCAL NO. 5; CHARLES SCHREIBER, Tile Layers Helpers Union Local No. 47, and Herbert Sebastian, Defendants.

Proceedings Had Before Honorable Otto H. Breidenbach, Judge Presiding,

January 30, 1936, at 2:00 P. M.

Appearances:

Leon B. Lamfrom, Esquire, and A. J. Englehard, Esquire, Attorneys for Plaintiff.

Joseph A. Padway, Esquire, Attorney for Defendants.

DECISION—Filed January 30, 1936

I have given this matter careful consideration and it presents a very interesting and very serious question and a

somewhat close question, but I have decided that the more recent trend of cases upholds the contention of the defendant that the injunction should not be issued. Injunction should be issued only in the clearest case and I am not satisfied that the case at bar is such an one. I feel very much inclined to adopt the concurring opinion in Rorabeck vs. Motion Picture Machine Operators' Union, cited by plaintiff. I consider that decision correctly states the rule controlling in this case. The court, Judge Hallam, states as follows:

[fol. 87] "I do not understand that the right of a man to work in his own business is questioned, nor do I understand that there is any claim of right of defendants to destroy plaintiff's business' on any ground. I understand that defendants have the right to refuse to work as fellow workmen with non-union men or with an employer, and that they have a right, in a proper and orderly manner, to advise one another, or the public, that a certain employer does not employ union operatives, or that he insists on operating his own machines. It seems to me the main question in the case is whether the conduct of defendants has amounted to more than that. If not, their acts have not been unlawful." The more recent trend of decisions upholds the contention of defendants that the case at bar presents a labor dispute. And that the rule contained in Paragraph III of the proposed contract is not in itself unlawful, its purpose being to ameliorate the condition of the members of the Union. There is no showing of malice. The Injunction, therefore, should be denied.

[fol. 88] [Filed endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

Findings of Fact and Conclusions of Law—Filed March 21, 1936

The above entitled action having duly come on for trial, the plaintiff appearing by Lamfrom, Tighe, Engelhard & Peck, by Leon B. Lamfrom and A. J. Engelhard, his attorneys, and the defendants appearing by Joseph A. Padway, their attorney, and the case having been tried upon the merits, and the case having been fully and completely

argued before the Court, and the Court having taken the matter under advisement, and being now well and sufficiently advised in the premises, hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. That the plaintiff is and was a resident of the City and County of Milwaukee, State of Wisconsin, residing at 3162 N. First Street, in said city; that he is engaged in the tile business as a contractor, and that he conducts his business under the name of "Paul Senn & Co. Title Contracting, 3162 N. First Street, Milwaukee, Wis."

2. That the defendant, Tile Layers Protective Union, Local No. 5, and the defendant, Tile Layers Helpers Union, Local No. 47, each was and is a voluntary unincorporated association of individuals and each was and is what is commonly known as a trade union; that the business of each [fol. 89] is that usually carried on by trade unions; that the business address of the defendant, Tile Layers Protective Union, Local No. 5, is 2904 N. 47th Street, Milwaukee, Wisconsin, and that the business address of the defendant, Tile Layers Helpers Union Local No. 47 is 3800 N. 47th Street, Milwaukee.

3. That the defendant, Charles Schreiber, is the business agent of said Tile Layers Protective Union, Local No. 5, and is by occupation a tile setter and resides at 2904 N. 47th Street, Milwaukee, Wisconsin.

4. That the defendant, Herbert Sebastian, is the business agent of said Tile Layers Helpers Union, Local No. 47, and is by occupation a tile layers helper and resides at 3800 N. 47th Street, Milwaukee, Wisconsin.

5. That this action is brought against all of the members of said local union No. 5 and the members of said local union No. 47 and against the agents, employees and representatives of said local No. 5 and local union No. 47, and this suit is brought against the said locals in their own names and against Charles Schreiber and Herbert Sebastian as officers and representatives of all of the members of said locals, their agents, employees and representatives, for the reason that it is impracticable to join the individual members of said local unions because of their large numbers.

6. That the plaintiff, for approximately four years, and at the time of the commencement of this action, conducted the business of a tile contractor at 3162 N. First Street, in the City of Milwaukee; that he also rents a show room at 4738 W. Lisbon Avenue, in the City of Milwaukee, wherein he has on display samples of tile; that the plaintiff has heretofore employed one or two tile layers and one or two helpers, depending on the amount of work he has con-
[fol. 90] tracted to do at a given time; that the plaintiff, in fulfilling his contracts for the setting of tile, works with the tools of the trade as a tile layer and tile layers helper; that the plaintiff, in his business as contractor, also takes subcontracts for the installation of tile in homes or buildings requiring that kind of installation.

7. That none of the employees of the plaintiff were at the time of the commencement of this action members of either of said defendant unions; that no contractual relation of any kind exists between the plaintiff and the defendant unions; that the defendant unions have not been designated by any of the plaintiff's employees as their agent for collective bargaining or for any other purpose.

8. That between March 14, 1935, and December 6th, 1935, the plaintiff and the business agents and representatives of the defendant unions have had discussions and conferences respecting the "unionizing" of plaintiff's business; that the defendants sought to have plaintiff "unionize" his business; that in connection with the discussions aforereferred to, the defendants submitted to plaintiff an agreement, Exhibit —, setting forth the terms and conditions for the operation and maintenance of a union shop, which agreement is substantially identical in form with those entered into between the defendants and other contractors in the city of Milwaukee whose businesses are unionized.

9. That the plaintiff refused to sign such agreement unless there was stricken from said agreement Article III, which reads as follows:

"It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper, but that the installation of all materials claimed by the party of the second part listed under the caption "Classification of Tile Work" in this agreement shall be done by

journeymen members of Tile Layers Protective Union Local No. 5."

[fol. 91] that plaintiff was willing to agree to the other terms and conditions of the agreement; that Article III was a condition contained in contracts in all shops which were unionized; that defendants were unable to eliminate Article III from the contract without discriminating against other unionized shops; that defendants would not agree to eliminate Article III from the agreement tendered the plaintiff; that plaintiff would not agree to operate his business in compliance with the agreement with the inclusion therein of Article III.

10. That because of the foregoing refusal the defendants caused the premises at 3162 N. First Street, Milwaukee, Wisconsin, to be picketed and patrolled, said pickets carrying banners with the inscription thereon that the plaintiff is "unfair to organized labor"; that they caused the plaintiff's automobile to be followed from his place of business to the jobs where he worked, for the purpose of discovering where the plaintiff and his men were performing tile work so that plaintiff's jobs might be picketed and patrolled by the defendants.

11. That some months ago a letter was directed by the defendants to architects and contractors requesting them not to patronize the plaintiff because he was conducting a non-union shop, and stating that if they did so patronize the plaintiff they would be picketed; that although such letter was sent, no actual picketing of any architect or contractor was had and no steps were taken to do the things set forth in the letter.

12. That the agreement entered into by the defendants with other tile contractors in the city and county of Milwaukee is a collective agreement governing wages, hours and working conditions for their members who are journeymen and journeymen helpers recognized as craftsmen [fol. 92] in accordance with the Constitution of the defendant organizations. (Said Constitution is Exhibit —).

13. That all contractors who have entered into such agreement with the defendant unions are classed by the defendants as union contractors, and that all contractors who have refused to enter into said agreement are classed by the defendant unions as non-union contractors.

14. That by virtue of the agreement between the defendant unions and the union contractors, the defendant unions and their members secure advantages in wages, hours and working conditions in maintaining a standard of wages and working conditions satisfactory to the defendants and their membership; that the wages paid to the defendants and their members by union contractors have for some time been higher than the wages paid by the plaintiff to his employees.

15. That the tile industry for some years last past has been in a demoralized state because of a lack of building operations; that the defendants and their members have been in competition with non-union tile setters and helpers in their effort to secure work as a means of livelihood; that for the purpose of enhancing the interests of the defendants and their members, the defendants and their members have found it necessary for the protection of their individual rights in the prosecution of their trade, to require of all employers agreeing to conduct a union shop to agree: "That no individual, members of a co-partnership or corporation engaged in the tile contracting business, shall work with the tools or act as helper, but that the installation of all materials within the classification of tile work shall be done by journeymen members of the Tile Layers Protective Union."

16. That the plaintiff, by virtue of his status of an employer and contractor, is not entitled to membership in the defendant unions that the Constitution and Rules of the [fol. 93] defendant unions require among other things that a tile setter shall be a journeyman tile setter who shall have acquired his practical experience by virtue of an apprenticeship, and that such apprenticeship shall, among other things, consist of service as an apprentice of not less than three years; that the plaintiff has not served an apprenticeship as a tile setter in accordance with the rules of the defendant unions.

17. That the picketing has been peaceful, without violence, and without any unlawful acts.

18. That the defendants, by their counsel, have stated in open court that they will not pursue the automobile of the plaintiff from his place of business to his jobs; that they will refrain from sending any further letters to architects

or contractors, and will not indulge in any acts or conduct referred to in said letters towards said contractors and architects.

And, I find, as

CONCLUSIONS OF LAW.

1. That a labor dispute exists between the plaintiff and the defendants respecting the unionizing of plaintiff's business on the terms proposed by the defendants; that the plaintiff and defendants are parties to said dispute, and that such dispute is within the definition of a labor dispute as defined in the Labor Code, Sections 268.18 to 268.29, and subsections thereof, of the Wisconsin Statutes.

2. That it is not unlawful for the defendants, in furtherance of said dispute, to advise, notify or persuade, without fraud, violence or threat thereof, any person or persons, of the existence of said labor dispute; that it is not unlawful for the defendants to give publicity to, and obtain or communicate information regarding the existence of the facts [fol. 94] involved in such dispute whether by advertising, speaking, or patrolling any public street or any place where any person or persons may lawfully be, providing said acts are done without intimidation or coercion and without fraud, violence, breach of the peace, or threat thereof.

3. That the defendants have not indulged in violence or fraud; that because of their statement made by their counsel in open court and in their presence, that they will not send any more letters to owners, contractors, or architects as hereinbefore referred to, and will not indulge in any of the acts or conduct referred to in said letters, the Court concludes that no unlawful acts will be committed or will be executed or continued.

4. That the agreement submitted by the defendants to the plaintiff, setting forth terms and conditions prevailing in that portion of the industry which is unionized, is sought by the defendants for the purpose of promoting their welfare and enhancing their own interests in their trade and craft as workers in the industry.

5. That Article III of said agreement is a reasonable and lawful rule adopted by the defendants out of the necessities of the employment within the industry and for the protection of themselves as workers and craftsmen in the industry.

6. That the plaintiff is not entitled to the relief prayed for in his complaint.

7. That the above entitled action be dismissed on its merits without costs.

Dated, this 20th day of March, 1936.

By the Court.

Otto H. Breidenbach, Circuit Judge.

[fol. 95] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

148674

PAUL SENN, Plaintiff,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL NO. 5, CHARLES SCHREIBER, Tile Layers Helpers Union, Local No. 47 and Herbert Sebastian, Defendants

JUDGMENT—Filed April 3, 1936

The above entitled action being a request for a temporary injunction, but by stipulation of the parties the action having been tried upon its merits on the 13th, 14th, 15th and 16th days of January, 1936, before the Hon. Otto H. Breidenbach, Circuit Judge, Lamfrom, Tighe, Engelhard & Peck, by Leon B. Lamfrom and A. J. Engelhard, appearing for the plaintiff, and Joseph A. Padway appearing for the defendants, and a full trial having been had, and the Court having heard arguments of counsel and having made and filed its findings of fact and conclusions of law from which it appears that the plaintiff is not entitled to an injunction,

Now, Therefore, on motion of Joseph A. Padway, attorney for defendants,

It is ordered and adjudged that the relief prayed for by the plaintiff be and hereby is denied, and that the complaint [fol. 96] of the plaintiff be and hereby is dismissed on its merits without costs.

Dated, this 3 day of April, 1936.

By the Court.

Jas. L. McCormack, Clerk, by Harold H. Gruttner, Deputy Clerk.

Judgment entered this 3 day of April, 1936, at 2:50 P. M.

Jas. L. McCormack, Clerk, by Harold H. Gruttner, Deputy Clerk.

[fol. 97] In Circuit Court of Milwaukee County

Case No. 148674

Paul Senn, Plaintiff,

vs.

Tile Layers Protective Union, Local No. 5, Charles Schreiber, Tile Layers Helpers Union, Local No. 47, and Herbert Sebastian, Defendants

Bill of Exceptions

Be it Remembered, that this action being at issue and on the calendar was brought to trial at the October, 1935 term of said court and on the 13th day of January, 1936, before that branch presided over by the Hon. Otto H. Breidenbach, Circuit Judge, presiding, in equity, the plaintiff appearing by Lamfrom, Tighe, Engelhard & Peck, his attorneys, and the defendants appearing by Joseph A. Padway, their attorney; plaintiff's counsel stated the facts and issues in the case and then defendants' counsel likewise stated the facts and issues in the case, and then the following testimony was taken and the following proceedings were had:

[fol. 98] [Title omitted]

Testimony Taken and Proceedings Had Before Honorable Otto H. Breidenbach, Judge Presiding

Case started January 13, 1936 at 11:00 A. M.

Appearances

Messrs. Lamfrom, Tighe, Engelhard & Peck, Represented by Leon B. Lamfrom, and A. J. Engelhard, Attorneys for plaintiff.

Joseph A. Padway, Esquire, Attorney for Defendants.

[fol. 99] Opening statement made by Mr. Engelhard for plaintiff.

Opening statement made by Mr. Padway for defendants.
Statement made by Mr. Lamfrom.

The Court: We will adjourn to 2 o'clock this afternoon.

Luncheon recess had.

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2 P. M. Same appearances. Trial resumed.

CHARLES SCHREIBER, defendant, sworn, testifies adversely in behalf of plaintiff, as follows:

Examination by Mr. Engelhard:

Q. Mr. Schreiber, you are one of the defendants in this suit?

A. Yes.

Q. Will you speak up loud so we can hear you?

A. Yes, sir.

Q. You are the business agent of the defendant, Tile Layers Protective Union, Local No. 5?

A. Yes.

Q. Now, the Local No. 5, when I speak of that, I mean your union?

A. Yes, sir.

Q. Has about forty members today?

A. Forty-one, to be exact.

[fol. 100] Q. Now, have you a copy of the contract which was drawn up and which was signed by a number of tile contractors who do business in the city of Milwaukee?

A. Yes, I did have, but I gave it to Mr. Padway. He has it in his brief.

Q. (Continued.) A correct copy. Will you mark this as Plaintiff's Exhibit 1.

Copy of contract marked Plaintiff's Exhibit 1 for identification.

Q. I ask you Mr. Schreiber, whether Plaintiff's Exhibit No. 1 is an exact copy of the copy of the contract, which your counsel produced. You might compare that.

A. Well, yes. It is about.

Q. Mark this Plaintiff's Exhibit 2.

Letter marked Plaintiff's Exhibit 2.

Q. I offer Plaintiff's Exhibit No. 2 in evidence. Do you want to see this, Mr. Padway? I will show you Plaintiff's

Exhibits 1 and 2, and if there is no objection, we will let it go in now to have a connected record. I offer Exhibits 1 and 2 in evidence.

[fol. 101] The Court: Received.

Proposed contract marked Plaintiff's Exhibit No. 1.

Letter dated March 14, 1935, addressed to Paul Senn, by the Union, marked Plaintiff's Exhibit No. 2 in evidence.

Q. For the purpose of the record I will read the letter. "March 14, 1935." This is on the stationery of Local 5, Milwaukee, Affiliated with Brick layers, Mason and Plasterers International Union, and it bears the seal of the local and it is addressed to "Mr. Paul Senn, 3162 N. 1st Street, Milwaukee, Wis. Dear Sir: We herewith present a proposed agreement from the Tile Layers Protective Union Local #5, Wisconsin.

If it is your desire to co-operate with us and comply with the terms of this agreement as proposed we will be pleased to accept your signature and or if you desire to confer with representatives of Tile Layers Protective Union please notify the writer and he will make arrangements to suit your convenience.

Please let us hear from you within the next few days. Sincerely yours, F. D. Melvelle, Sr. Sec'y." Both in typewriting and in handwriting.

I will read into the record Article 3 of the proposed agreement, "It is definitely understood that no individual, member of a partnership or corporation engaged in the tile contracting business shall work with the tools, or act as [fol. 102] helper, but that the installation of all materials claimed by the party of the second part as listed under the caption "Classification of Work" in this agreement, shall be done by journeymen members of Tile Layers Protective Union, Local No. 5."

Q. You took up with Mr. Senn direct negotiations regarding the execution of this contract?

A. I did.

Q. And Mr. Senn—In your discussions with Mr. Senn, which were numerous?

A. Yes, three or four times. Three or four times.

Q. In your discussions with Mr. Senn there was always one point upon which you and he could not get together?

A. Correct.

Q. That point was paragraph 3 of the contract?

A. Yes.

Q. Wasn't that the big thing in the negotiations?

A. Well, the way you put it, you are simply trying to limit me in a way beyond this. Mr. Senn, with paragraph 3 I think got the ruling that a contractor working with the tools of the trade must be a practical tile setter and we felt that Mr. Senn never was a practical tile setter and we, under those conditions, couldn't work for him, or give him union men under those conditions.

Q. The point I am getting at is this. That if Mr. Senn had been willing to sign this contract, except paragraph 3, you would not have accepted it?

A. No, no, we couldn't. We couldn't.

Q. Until he is willing to accept paragraph 3 of the contract there will not be a contract?

A. There will be no contract between Mr. Senn and our union.

[fol. 103] Q. We all know when people are in dispute one makes a demand and the other fellow refuses?

A. Correct.

Q. As long as one makes a demand and the other refuses there is a dispute. You have stated to Mr. Senn in substance "You sign this contract" and he said "I won't". And Mr. Senn said "I will sign the contract if you will eliminate paragraph 3." That is what he said?

A. Well, with the addition—just a moment. With the addition we would take his man into our local as he seen fit. That was something that entered into it too.

[fol. 104] Q. Has Mr. Senn tied up the signing of the contract with the condition you have given to take that man?

A. Yes. He wanted to get his tile layer, Holly, into the organization, with the understanding we take him in and eliminate article 3.

Q. Have you ever said you won't take back Holly?

A. No.

Q. That is a matter still in negotiation. If he signs the contract with paragraph 3 eliminated, whether you take Holly back or not?

A. Oh yes, he wants to keep Holly working for him.

Q. I ask you whether subsequent to that conversation you received Exhibit 4?

A. Yes, I believe I received that letter from Mr. Senn.

Q. I offer these in evidence. I will read them into the record. On the stationery of "Paul Senn & Co., Tile Contractors, 3162 North First Street, July 24, 1935. Tile Layers Protective Union #5, 2904 N. 47th St. Milwaukee, Wis."

A. That is my home address.

Q. "Att. Mr. Chas. Schreiber. Dear Sir: I desire to go on record to the effect that I want to co-operate with the Tile Setters and Helpers Unions to improve conditions in the industry, further I want to confirm my statements which were made to you on July 23rd and 24th, relative to the above.

As you no doubt recall, I stated, that I would be glad [fol. 105] to employ union help on all my jobs, but for certain reasons, to-wit:

As a small contractor I cannot agree to stop working entirely, since my business (due to the length of time I have been in business, etc.) has not reached the proportion whereby I can live off of the labor of the few men I could employ. Then too, I feel it is my right as a contractor to perform any duty in connection with the work, as long as I do not infringe on the rights of union men. I am willing, tho, to agree to employ union setters and union helpers on every job, regardless size, but reserve the right to work with those men, during their working hours.

In reference to Arnold Holly, who has performed his duties satisfactorily during his employment with me, I will render such assistance to him to make it possible for him to become a member of your union.

In the event that we can equitably work this matter out to our mutual advantage, I will furnish you with a list of contracts now on hand, and proposals submitted, with the understanding that I may complete those jobs under the conditions under which they were taken.

I am sure we can reach a satisfactory arrangement in regard to these matters and thereby make a step forward, towards your goal of unionizing the contractors in Milwaukee.

Very truly yours, —— ——." It is unsigned, but you admit you received that letter?

[fol. 106] A. Yes, sir.

Q. Exhibit 4 is a letter, carbon copy of a letter, on the stationery of "Paul Senn & Co. Tile Contracting 3162 North First Street, Milwaukee, Wis. Aug. 8th, 1935.

"Tile Layers' Protective Union #5. 2904 N. 47th Street, Milwaukee, Wis. Attention Mr. Chas. Schreiber. Dear Sir:

"After our conversation this afternoon in which you informed me that the Union would not consider the suggestion in my letter of July 24th, I want to advise you that under the present conditions I cannot enter into an agreement with your Union as the rules now stand.

"Even tho I am one of the smallest contractors in the city I find I cannot compete with most of the contractors who have agreed to employ Union men under the rules dated April 1st, 1935. My facilities for displaying tile, my equipment and other definite charges against each individual job together with the methods I have employed to set tile, as you know, are cut down to the minimum, nevertheless I cannot obtain contracts on a competitive basis with the majority of the contractors who have signed up with you. Invariably their selling price is lower than mine.

"Then too, all the firms who have signed up with you have been in business many years, whereas, I have been in business a comparatively few years and my business has not reached the proportions where I can live off the labor of the few men I could employ.

"In view of the above it seems to me that the stand I [fol. 107] have taken in this matter is one whereby I am coming three-fourths of the way to improve conditions in the industry and am only asking you to come the rest of the way.

"Don't forget my suggestion was not to permit one member of any firm to work, as you formerly ruled in the past, but my suggestion specifically stated that a tile setter and a helper would be used on every job and if a small contractor wanted to he could work with these men.

"As you stated your proposition originally, which was in effect, that you would deal with each firm individually, I want to advise you that I would be willing at any time to sign up with your Union if and when you will give me the considerations I have asked for.

"P. S. I have written to Washington for an opinion on this matter. Very truly yours." Do you know what he meant when he said he wrote to Washington?

A. Yes, sir, he wrote to the International Union.

Q. Did you ever receive a copy of that?

A. I did.

Q. I show you Exhibit 5, Mr. Schreiber, and ask you whether that is a—whether you received a copy of that letter from the International?

A. I just couldn't say that this is the same letter, but I received a copy of Mr. Senn's letter.

Q. And suppose you read sufficient to see whether you received a copy of this.

[fol. 108] A. There is one particular paragraph I remember very distinctly.

Q. I offer this in evidence.

The Court: It may be received.

Q. I will read it into the record, Your Honor. This is on the stationery of "Paul Senn & Co. Tile Contracting. 3162 North First Street, Milwaukee, Wis. Aug. 12th, 1935. Mr. John J. Gleeson, Sec., B. M. & P. I. U. of A., 815 15th St., N. W. Washington, D. C. Dear Sir:

"I would like to get an opinion from you relative an issue involving Union Tile Setters and Contractors in Milwaukee.

"In March, 1935, I received a communication from the [fol. 109] Tile Layers Protective Union, Local #5, Milwaukee, Wis., which stated in effect, that if I desired to cooperate with the union they would be pleased to accept my signature on the enclosed proposed agreement, or if I desired I could confer with the representative of the Union.

"After several conferences with Messrs. Melville and Schreiber, no progress was made because I could not abide by their Art. III, realizing if I did I would be out of business. Further, the Union, up to the present time will not compromise on this matter. Art. III reads as follows:

" 'It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper but that the installation of all materials claimed by the party of the second part as listed under the caption "Classification of Work" in this agreement, shall be done by journeymen members of Tile Layers Protective Union Local #5.'

"From May 15th, 1934, to May 15th, 1935, the total number of labor hours devoted to tile setting etc. by my company were 1777. This total is divided as follows:

Myself	771
Mechanic	856
Helper	150

"Due to conditions, competition, amount of work available, etc., the margin of profit on each job was and is very small. Now, how can I agree to have all of my work done by the Union, and give up the use of my tools? Assuming [fol. 110] that my volume will be 50% greater for the present year, it would still be impossible to earn my living on this basis inasmuch as the selling price of a tile installation, on a competitive basis, is rarely as high as labor and material plus 20%. All overhead costs to come out of the 20%.

"While the Union formerly permitted one member of a firm to work this provision, I imagine, was abused in slack times because an employer would work with only a helper, or as in my case, a mechanic and I do all the work. Improving conditions in the industry is something that should be worked for by all connected with it, but I do not believe the Union should try to take out American Citizen's right to earn his living away from him. This will only result in establishing of a broker and further demoralizing of standards.

"While I am comparatively new in the industry, in business since 1931, I have had the interests of the industry at heart and would like to work towards improving conditions. I have, by word of mouth and letter told the Union representative that I will be willing to employ a Union helper and a Union setter on every job regardless of size, but that I wanted the right to work with them during their working hours. Further, that the man now employed by me, who formerly belonged to Local #5, would be taken back on the terms stated by the representative.

"Could you advise me what course to pursue in this matter and also has any Local of the International Union the right to discriminate against a small contractor? Naturally [fol. 111] most of the old established firms feel that it is unfair competition for a small contractor to work with the tools, but is it if this small contractor employed Union mechanic and helper on every job and worked with them part of the time?

"I feel, that the present policy is discriminatory to the nth degree, so much so that it seems the small business man is to be run out of business. I am sure that this is not the policy of the International Union, and while there are ways of combating this movement, I feel that the best thing for the industry would be to work out matters of this kind in a fair and equitable manner. Very truly yours." Now, Mr. Schr-iber, have you the constitution of the Bricklayers, Masons and Plasterers' International Union of America?

A. Yes.

Q. I will show you this book and I ask you whether that is the present constitution?

A. That is the present constitution.

Q. Turn to page 86 of that. I will offer in evidence at this time, Mr. Padway, Section 6, on page 86, of the Constitution, which reads as follows:

"Sec: 6. Members of the I. U. shall not accept employment with a contractor who works with the tools of the trade unless said contractor is a practical bricklayer, stonemason, cement mason, plasterer, marble mason, tilesetter, mosaic or terrazzo worker.

This Section shall be inserted in all subordinate unions' by-laws."

[fol. 112] I ask you at this time does that section—is that section included in your local by-laws?

A. Yes.

Q. Now, do you know what Mr. Senn's experience has been in any of these fields.

A. In any of these fields? Of course—(Interrupted).

Q. I am asking you, do you know his experience, or is it just hearsay?

A. I don't know any of his experience, no, sir.

Q. During all of this time he never had a member of your union on the job?

A. Oh yes he did, when he started business he did.

Q. When you started in April?

A. We have negotiated with him for five years, when he started in business.

Q. In this letter that Mr. Melville sent to Mr. Senn, with the enclosed proposed contract?

A. Yes, sir.

Q. You, as a union labor leader, knew that there was a demand on him to sign it?

A. Yes, sir.

Q. He refused to sign it?

A. Yes.

Q. From that time on you or Mr. Melville, or your so-called arbitration board—. Isn't there an arbitration board?

A. Yes.

Q. You from time to time approached Mr. Senn and said [fol. 113] you had better sign on the dotted line?

A. Yes, sir, just about.

Q. He said: "Gentlemen, I cannot do that because I have to earn my living with my own hands". Didn't he say that?

A. He did at times. He said "When my business warrants, as soon as he puts on another man or so he would sign that agreement."

Q. When the 6th of December arrived, that was the day that the picketing commenced?

A. Yes.

Q. What time of the morning did you put pickets there?

A. I should judge 8 o'clock.

Q. How many?

A. Two on the first day.

Q. Later on you increased to four?

A. Yes.

Q. Then reduced to two?

A. Yes, it varied. Not more than four or less than two.

Q. Were there the same men always who were picketing, or did you stagger the picketing?

A. No. I think that most of the time it was the same men on that picket job.

Q. They started at eight and did the picketing on that day.

A. Yes, from eight to about noon and from one to about four, something like that.

Q. Would the same men return the next day, or did you put on new men?

A. No, I think I put on the same men.

Q. From the 6th of December down to the time that this lawsuit started, you say that they were the same four men, or two men?

A. Well, I couldn't answer that truthfully, but I am quite sure it was the same four men.

[fol. 114] Q. You provided these men with a sign?

A. Yes.

Q. Who determined what the wording was?

A. I did.

Q. Do you recall what the wording was on that sign?

[fol. 115] A. One sign, "P. Senn Tile Company is unfair to the Tilelayers Protective Union" and the other sign read "Let the Union tile layer install your tile work".

Q. When the picketing started on the morning of the 6th of December you say you had a conversation with Mr. Senn?

A. Yes.

Q. What was that conversation?

A. Well, he got a little bit peeved. I said that really we had to do it and he put on another man and he was threatening to go into the brokerage business selling tile and anybody wanting tile, he says. He mentioned that it was within the law and we wanted to put a stop to it. He took me into the garage and showed me the title. Furthermore, he showed me what he intended to do, to wreck the tile industry.

Q. You intend to continue picketing?

A. We do.

Q. You intend to picket the work where Mr. Senn is working?

A. We do.

Q. As soon as you find out where he has a job?

A. Yes.

Q. There is no dispute if your men could have found out where Mr. Senn was working they would have picketed those places?

A. Yes.

Q. You knew that they tried to find out?

A. Yes.

Q. They followed him for several blocks but Mr. Senn shook them?

[fol. 116] A. I don't know how far they followed him.

Q. They reported?

A. They didn't say how many blocks or miles, but they merely told me that they followed him and he got away from the garage too early.

Q. It was the intention of the pickets——

A. To find out where the jobs were.

Q. They were instructed to find out?

A. Yes, that was their instruction.

Q. As a matter of fact, every member of the union is instructed to find out where Mr. Senn is doing work?

A. Yes.

Q. As soon as you find out where he is doing the work those places will be picketed?

A. Yes.

Q. You are aware of the fact that in July your union sent out a letter to all of the contractors?

A. Yes.

Q. And the architects?

A. Yes, most of them.

Q. In that letter you notified them that if they did business with any of the contractors who were on the so-called unfair list, you would picket their offices?

A. Correct.

Q. And the place of business where they were doing work?

A. Yes, sir. That was the gist of the letter. Yes, sir.

[fol. 117] Q. The intention being——(interrupted.)

Mr. Padway: The letter will speak for itself.

Q. Lets have the letter. I will use it at this time. Who is A. R. in your organization?

A. There is no A. R. in our organization.

Q. I show you Exhibit 6 and ask you whether that is a copy of the letter sent out?

A. That is the copy, yes, sir.

Q. I will offer it in evidence and read it into the record.

The Court: Received.

Letter dated July 11, 1935, marked Plaintiff's Exhibit No. 6 in evidence.

Q. "Tile Layers' Protective Union Local #5 Milwaukee, Wis. Affiliated with Bricklayers & Plasterers International. July 11, 1935. Dear Sir." I assume, Mr. Schreiber, that would be addressed to a particular individual?

A. It was a form letter merely sent out, we will say, to Tom Jones and the dear sir would cover it.

Q. "Some time ago we presented to each individual tile contractor in the city a copy of our new agreement, in which we specified what constitutes a bona fide contractor and who should install the work.

"Not having heard from some of these so called tile contractors in a given time, we beg of you to contact the list of fair contractors listed below in awarding the tile work in

your building operations. If in two weeks time anyone out-
[fol. 118] side this list is awarded tile work we will then picket such jobs, contractors' or architects' offices, or employ other lawful means to help us in our fight to better the conditions of our trade.

"The firms working in harmony with us are as follows: Butler & Sons Co., Cafmeyer Brothers, U. S. Durner & Co., Midwest Tile Art Co., Milwaukee Tile & Mosaic Co., H. Neidner & Co., Stark Mantel & Tile Co. Hoping you will cooperate with us, we beg to remain Very truly yours, Tile Layers Protective Union No. 5."

Q. The only reason why you have not been able to picket at the premises wherein Mr. Senn is at present installing tile is because you have not been able to locate the premises?

A. We located some jobs but we didn't get up there.

Q. But it is your intention to picket jobs in the future?

A. Yes.

Q. Unless, of course, you are stopped?

A. Yes. Surely.

Q. Now, what would you require of Mr. Senn to do today in order that you give up picketing his home and from picketing the jobs he works on?

A. Sign this agreement.

Q. If he did that you would pull off the pickets?

A. Yes, and furnish him with union men.

Q. He has indicated that he is willing to use union men?

A. That is the charge back we had with Holly. We had to take him in our organization under his conditions. The way he put it to me.

[fol. 119] Q. Unless he agreed to quit work himself with his tools you wouldn't enter into a contract with him?

A. Correct.

Q. Until he does agree to lay down his tools and only employ union men to do the work, he himself is now doing, until that time you intend to use what your attorney called economic pressure?

A. Lawful picketing.

Q. You claim you can lawfully picket him because you claim you have a right to make the claim you do on him?

A. Yes, sir.

Q. There is no dispute between us on that?

A. Yes.

Q. Mr. Schreiber, if Mr. Paul Senn agrees to every article of your proposed contract, except article 3, you will still continue to picket?

A. I don't understand the question.

Q. If he agrees to every article of the ten articles except article 3?

A. Yes, sir.

Q. You will still continue picketing?

A. Yes.

Q. That is all.

Mr. Padway: That is all.

[fol. 120] PAUL SENN, plaintiff, sworn, testifies in his own behalf as follows:

Direct examination.

By Mr. Engelhard:

Q. Mr. Senn, you are the plaintiff in this case?

A. I am.

Q. How old a man are you?

A. Thirty-six.

Q. Have you a family?

A. Yes, sir.

Q. What does it consist of?

A. A wife and four children.

Q. How old are your children?

A. Four, six, ten and twelve.

Q. Where do you live?

A. 3162 North First Street.

Q. Do you own your home?

A. No.

Q. Do you rent it?

A. Yes, sir.

Q. In connection with the place where you are living do you have a little office?

A. Yes, sir.

Q. Where did you have the office?

A. In my dining room.

Q. What does it consist of?

A. A desk and a typewriter.

[fol. 121] Q. Just a corner of the dining room?

A. Yes, sir.

Q. Do you have people come into that office in connection with your business?

A. Sometimes, but not very often.

Q. You have your desk and typewriter convenient for the purpose of writing in your business affairs?

A. Yes, sir.

Q. And also private affairs?

A. Yes.

Q. Do you have a garage on your premises?

A. Yes.

Q. Do you have tools and equipment in your garage?

A. I carry the tools in my garage. I have a truck. Also in a different garage but a separate garage I have the other stock.

Q. By the stock you mean tile?

A. Yes.

Q. Now, you have been doing business under the firm name of Paul Senn & Company?

A. Yes, sir.

Q. You, however, are not a corporation?

A. No.

Q. You are not in membership with anybody else?

A. No.

Q. You are simply doing business under the firm name of Paul Senn & Co.?

[fol. 122] A. Yes.

Q. How long have you been in the tile setting business?

A. About the middle of 1930 is when I started working at the trade.

Q. Where is that?

A. At Miami, Florida.

Q. Prior to that time what was your trade or profession?

A. How far back do you want to go?

Q. Lets go back to see what experience you have had in connection with the building industry.

A. We will have to go back to the time I left school. I took up engineering work and was an engineer—(Interrupted)

Q. What year was that you left school?

A. 1916.

Q. What school did you leave?

A. The County Agricultural College.

Q. Was that work above the high school grade?

A. That was supposed to be a preparatory school for Madison.

Q. How much education do you have? Did you pass the eighth grade?

A. Yes.

Q. Did you go through high school?

A. I didn't finish high school. I think I left in the third year.

Q. Then you went to the Milwaukee County Agricultural School?

A. Yes.

Q. How long did you attend that school?

A. About a year.

Q. How old were you then?

[fol. 123] A. Seventeen.

Q. And then in—in 1916, when you left that school, you went into what business?

A. I took up engineering work, electrical and civil. I took up a correspondence course and also at the University Extension at Milwaukee.

Q. How long did you do that kind of self education?

A. Approximately two years when the company I was employed with transferred me to their New York office.

Q. Did you go to New York?

A. Yes.

Q. Was that about in 1918?

A. Yes.

Q. How long did you stay there?

A. Until approximately 1921.

Q. What kind of work did you do in New York?

A. I was in charge of sales service in the particular department that I was employed in which had—my duties were to install equipment in steel mills and gas plants throughout the United States, everything east of Pittsburgh.

Q. Electrical equipment?

A. Well, it consisted of electrical work, piping big thirty, forty and sixty inch mains.

Q. In 1921 where did you go after you left New York?

A. I came back to my home town Milwaukee and was

employed by the Milwaukee Gas Light Company as industrial engineer.

Q. How long did you work for that company?

[fol. 124] A. Approximately three years.

Q. That would take you down to 1924?

A. Yes.

Q. And then what did you do?

A. I then went in the real estate field in Miami. I moved to Florida because of my wife's health.

Q. You stayed down there about six years?

A. No, for one year during the boom.

Q. 1924 and '25?

A. Yes.

Q. Then what did you do? What did you do down there?

A. Real estate business. And I did some building down there.

Q. When you say you did some building, do you mean as a contractor?

A. Yes.

Q. Did you use your own tools? Did you work with your hands as contractor down there?

A. Yes.

Q. What kind of work did you do?

A. I built three houses.

Q. What particular trade did you work at while building the houses?

A. I did everything I could in connection with that work.

Q. With your own hands?

A. Yes.

Q. Some time in '25 you came back to Milwaukee with your wife?

A. Yes.

Q. She had sufficiently recovered?

[fol. 125] A. No, but I came back.

Q. Then what did you engage in?

A. Plastering business, as contractor.

Q. Did you do plastering with your own hands and tools?

A. Yes.

Q. For how many years from 1925 did you do plastering?

A. Until about the middle of 1930.

Q. A period of about five years?

A. Yes.

Q. How many men did you employ as a plastering contractor?

A. When I first started, two and myself, and during the peak in 1928 and '29 I had as high as thirty working for me.

Q. Did you do any of the work with your own hands and tools when you had thirty working for you?

A. No. It was a physical impossibility.

Q. You took care of the contractors?

A. Yes.

Q. When did you return to Florida?

A. Middle of 1930.

Q. What was the occasion?

A. The condition of the health of my family.

Q. When you went down there——

A. It was a case of earning a living and I had decided to go in the tile business some time previous to that. So I hired out as a day laborer for a tile contractor down there.

Q. For how long a period did you do tile work in Florida?

[fol. 126] A. I should say about nine or ten months. It wasn't quite a year.

Q. In that connection you set tile?

A. Yes.

Q. You also worked as a helper and as a tile setter?

Mr. Padway: Objected to as leading.

Q. Tell us what you did?

A. It was not more than one week after I was employed by this contractor down there that they put me at the actual setting of tile and my duties as helper were delegated to somebody else.

Q. For how many months did you work in Florida as a tile setter?

A. Approximately eight months I would say.

Q. When, in 1930, if it was in '30, did you return to Milwaukee?

A. I think it was the 23rd of December.

Q. 1930?

A. Yes.

Q. What did you do when you came back to Milwaukee?

A. I went down to see some of my friends I had doing business with.

Mr. Padway: How long were you in Florida in 1930?

A. Approximately eight or nine months.

Q. Now then, you are back here in Milwaukee on the 23rd of December, 1930?

A. Yes.

Q. What did you do?

A. I went to see some of the people I had been doing business with as a plastering contractor and asked them whether or not I could figure tile work together with the plastering, which I had been doing formerly. I went out soliciting con- [fol. 127] tracts as a plasterer and tile, to do the plastering and tile work in a residence for a specific sum of money.

Q. As a contractor?

A. Yes.

Q. As principal contractor or subcontractor?

A. Yes. Dependant I solicited from an architect or general contractor.

Q. Can you recall your first job, 1931?

A. Yes, I can. Cumberland Forest Heights.

Q. Were you general contractor, or subcontractor?

A. Subcontractor. I had about four plasterers and helpers in connection with the plastering and I employed one union tile setter. I believe that during that job, which took several weeks, I think that my brother worked for me two or three days at setting tile.

Q. And did you on that job, did you do any work yourself?

A. Oh yes.

Q. What type of work did you do?

A. Everything I possibly could to save time. Setting tile, mixing mud, carrying mud. Stuck pieces of cap on the wall. Everything to make the tile worker as easy as I could. I did personally set some tile as much as I could, but not much.

Q. Tile setting in a residence is usually done in connection with the bathroom?

A. Yes.

Q. Any other parts of the house?

A. Vestibule. Fireplace hearth. Kitchen walls and sinks. Mantels. Sunroom floors and in one or two instances in my business I have put in tile floors in every room of the house.

[fol. 128] Q. Then, commencing either in the latter part of '31 and down through the years 1932, '33, '34 and '35, you have been devoting your time exclusively to tile contracting?

A. I have.

Q. What has been the largest number of men working for you since you have been in the tile setting business?

A. Four and myself working for two and a half days. That is the largest number I have had working for me.

Q. What is your usual crew?

A. A man and a helper. That has been for the last six or eight months of 1935. Prior to that I think I didn't have a helper but roughly about one-fifth of the time. The rest of the time I did the work with one man.

Q. That is, prior to the latter part of 1935, as I understand it, eighty per cent of the work of the helper was done by you?

A. Yes.

Q. And you employed a mechanic?

A. Yes.

Q. You mean by that a tile setter?

A. Yes.

Q. The tile setter does not do all of the work necessary in order to set tile in a bath room?

A. No, sir.

[fol. 129] Q. He merely does the actual setting?

A. Yes. Those are his duties.

Q. He cuts the tile?

A. No, as a rule the helper cuts the tile.

Q. He does the mechanics of putting the tile in place?

A. Yes, sir. The helper brings him all of the materials he requires and makes cuts and makes it as easy as he can.

Q. Is it correct to say since you have been in the tile setting business, with the exception of 1935, you have never had more than one man working for you, except twenty per cent of the time you had a helper helping the mechanic?

A. I had another man working on the job. Not necessarily helping the mechanic. It might not be twenty per cent of the time, but closer ten per cent.

Q. During that period of time, down to the present, you have been doing all kinds of work yourself on any of these tile setting contracts?

A. Yes.

Q. You would set tile?

A. Yes.

Q. Mix cement?

A. Yes.

Q. Do the work of a helper and tile setter?

A. Yes.

Q. During the year 1935 you made about how much money net?

A. 1935?

[fol. 130] Q. Yes.

Mr. Padway: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

Exception.

A. About $1500.00.

Q. And how much of that $1500.00 is net?

Mr. Padway: I don't want to repeat these objections so may it be understood that my objection pertains to this line of examination.

The Court: Yes.

Q. How much of that 1500.00 net that you made during 1935 do you attribute directly to your own labor?

A. About half.

Q. About $750.00?

A. Yes.

Q. How much have you invested in your business as a tile contractor?

A. Roughly it would be between 7 and $850.00. I don't know just what my inventory is.

Q. You have stated in your complaint you have invested approximately $700.00 in tools, equipment and supplies?

A. Yes.

Q. Will you tell us what your tools are?

A. Mortar box, shovels, pails, a truck, straight edges, the tools of the trade. Of course, in that $750.00 I also included an estimate of my inventory.

[fol. 131] Q. Your inventory is the most expensive part of your investment?

A. Yes.

Q. What does your inventory consist of other than tile?

A. That is about all.

Q. You have a display room for your tile?

A. Yes.

Q. Where.

A. 4738 Lisbon Avenue.

Q. Do you rent that display room?

A. Yes.

Q. How much rent?

A. $15.00.

Q. In that you have a display of various colors and designs of tile?

A. Yes.

Q. Now, what is your annual overhead in connection with your business, fixed overhead? I don't mean the wages you pay. But just the fixed overhead charges, such as rent, telephone, heat, operation of motor vehicles and other expenditures.

A. I have not computed it for the year 1935, but offhand I would say it is around 8 or $900.00 a year.

Q. I notice in your complaint you stated about $600.00. Did you, since you signed the complaint, have occasion to look into that?

A. I mulled it over in my mind and I had forgotten certain items which should be included in overhead.

Q. $15.00 a month for the rent of the show room?

A. Yes.

Q. Expense of operating the automobiles?

A. Yes.

Q. That is an essential part of your business?

A. Yes.

[fol. 132] Q. You haul your tile in your automobile to the job?

A. I have a truck but I don't use it all of the time. I need the car also.

Q. You have telephone expense?

A. Yes.

Q. Heat?

A. Yes, sir. Three garages.

Q. What is that?

A. Three garages.

Q. You use three garages?

A. Yes.

Q. Two for the automobiles?

A. Yes, sir.

Q. And one for tools?

A. For stock.

Q. You didn't carry your stock in the display room?

A. Oh no.

Q. You merely have your samples there?

A. Yes, sir.

Q. Have you any other income other than the income you get from the tile business?

A. No.

Q. Work done by your own hands?

A. Yes.

Q. In 1935 you have stated the income was one-half due to your own labor and one-half due to the contracting end?

[fol. 133] A. Yes.

Q. The business is highly competitive?

A. Very much so.

Q. You and Arnold Holly together, whoever was necessary, pitched in and did the work?

A. We did. The way we worked it I would do all of the helper's work and he would devote his time setting tile. I found out I had at least two or three, or sometimes four hours a day, I could devote to setting tile.

Q. And when that time came you pitched in and set tile?

A. Yes.

Q. I understand from your previous testimony, Mr. Senn, that your testimony testifies this, that out of $1500.00 approximately $1500.00 net, you made in 1935, about $750.00 of that you would have been required to pay to somebody else had you employed somebody else to do the work you did yourself?

A. Yes.

Q. The other $750.00 you made, you contribute to your contracting?

A. Yes.

Q. You devoted considerable time in getting new contracts in '35?

A. Yes.

Q. Can you state approximately how many contracts you performed in 1935?

A. Oh, in the neighborhood of forty.

[fol. 134] Q. Forty?

A. Yes.

Q. What is the average amount of one of those contracts?

A. They vary in size, some as low as $25.00 and the largest I had was about $1000.00.

Q. Out of these forty contracts you had during 1935, were most of those as subcontractor or as principal contractor?

A. I would say about eighty per cent were subcontracts and the balance the principal contractor.

Q. Now then, since you have been in the business of tile contractor you say you have not had anybody employed who was a member of this Union, Tile Layers' No. 5?

A. In 1935 I had a union helper working for me for a few months, but nobody from the Tile Setters Union.

Q. That is, Local No. 5?

A. I did not have anybody working from there.

Q. They supply merely the tile setters?

A. Yes.

Q. That is called mechanics?

A. May I ask the full time I was in business, or in 1935?

Q. From 1931, as a tile contractor in the city of Milwaukee?

A. The first man I employed was a member of the Tile Layers Union.

Q. That was in 1931?

A. Yes.

Q. What happened to him?

A. While we were working on the job the business agent came on the job and told me I couldn't work and I told him [fol. 135] I was going to continue to work. A short time later my man told me he had been fined at the union because he worked with me, and asked me what to do about it. I says: "There is nothing to be done about it. That is entirely up to you." He said he was going to continue to work for me and he did work for me until he got a job in a brewery. Since that time I have not employed any one from the Tile Setters' Union.

Q. Now, did you employ any member of the other union, other defendant union, the Tile Layers' Union No. 47?

A. Yes, I did. In 1934 I had a man working for me for approximately three months.

Q. What happened to him?

A. I believe that he just got other employment when my work dropped off.

Q. He was laid off by you and he was employed some place else?

A. Yes.

Q. During the year 1935, you employed no one who was a member of either of the two defendant unions?

A. No.

Q. And your present employees are not members of either one of these two unions?

A. No.

Q. Now, in April, or rather in March 1935, were—did you receive a communication from the Tile Layers' Protective Union Local No. 5?

A. I did.

[fol. 136] Q. I show you Plaintiff's Exhibit 2 and I ask you whether that is the communication which you received?

A. Yes.

Q. What was included with Exhibit 2?

A. The proposed contract.

Q. I show you Plaintiff's Exhibit No. 1 and I ask you whether that is the proposed contract?

A. Yes.

Q. Has the Union, since that time, ever offered any other proposed contract other than Exhibit No. 1 for you to sign?

A. In writing?

Q. In writing?

A. No.

Q. Now, have you had any correspondence with the union since the receipt of the letter dated March 14, which is Exhibit 2?

A. After each, what I considered each important conference with Mr. Schreiber I confirmed my statements to him in a letter to him.

Q. Did you have any conferences with Mr. Melville prior to the time you had conferences with Mr. Schreiber?

A. Yes.

Q. I show you Exhibit 3 and ask you whether or not that is a carbon copy of a letter you sent to Mr. Schreiber?

A. It is.

Q. Likewise I show you Exhibit 5 and I ask you whether or not that is a carbon copy of a letter you sent to Mr. Schreiber?

A. It is.

[fol. 137] Q. I show you 5 and ask you whether or not that is a carbon copy of a letter you sent to the International?

A. It is.

Q. When I say International, I am now referring to the International Union known as the—known as the Brick

Layers', Masons & Plasterers International Union of America?

A. Yes.

Q. Did you receive a reply from the International?

A. I did not.

Q. Did you ever receive any information from Mr. Schreiber to the effect that the International had received this letter from you?

A. I did not.

Q. To this moment you didn't know whether or not the letter had been received by the International?

A. No.

Q. When did you first learn that it had been received?

A. I didn't learn that it had been received, other than the fact that it had not been delivered back through the United States Government mails.

Q. You heard Mr. Schreiber testify about that he had received a copy of the letter?

A. Yes, I did.

Q. When you received Exhibits 1 and 2 what did you do?

A. I called Mr. Melville on the phone and started to discuss article 3 with him and he at the time suggested we get together and talk this matter over and he came over to my house and we had a conference that lasted about half [fol. 138] an hour I would say.

Q. What was the substance of the conversation you and Mr. Melville had at that time?

A. I expressed my willingness to work in accord with the Union on all provisions with the exception of article 3 and I think—I am not positive about that—but if my memory serves me well, the outcome of that conference was that I was to get all of the other small contractors in the field at my show room and also further discuss this matter and Mr. Melville then came up with some of the other members of the arbitration board and there were some eight or nine contractors in my same position and most of them voiced the opinion that they would be willing to employ union help if the union—(Interrupted)

Mr. Padway: Was this conversation had in the presence of any of the union officials?

A. Mr. Melville was there, Mr. Sutton and I believe Mr. O'Neill of the Butler Tile Company. He is a member of

the arbitration board, as I understand. Mr. Weiller I believe was there. There were three or four members there. We couldn't come to an agreement.

Q. On what?

A. In regard to article 3. Most of them, I think it was almost unanimous, most of the small contractors said they would be glad to play with the union, but they could not give up the use of their tools and that was about the end of the meeting.

Q. By that they meant they would not give up the right [fol. 139] to work themselves with the union men?

A. Yes.

Q. How did you happen to call him?

A. Shortly after they sent their letters out to the contractors and architects saying they would picket the jobs. After I received copies of those letters from the people I did business with I called Mr. Schreiber.

Q. That is how you happened to get his name?

A. Being in the industry I don't know how I got his name, but I knew that Mr. Schreiber was the business agent.

Q. Then you contacted him?

A. Yes, sir.

Q. And referring now to Exhibit, which is your letter of July 24th, does that indicate whether it was your conversation on July 23rd and 24th—does it indicate that was your [fol. 140] first contact with Mr. Schreiber, or had you contacted him before the 23rd of July?

A. I believe that was the first time I contacted Mr. Schreiber.

Q. I show you Plaintiff's Exhibit No. 6 and ask you whether that is the letter sent out to the contractors you did business with?

A. Yes.

Q. And you got a copy of that?

A. Yes.

Q. That is the one in which they threatened to picket the architects and contractors office?

A. Yes.

Q. What was your conversation with Mr. Schreiber on the 23rd of July?

A. The sum and substance of it was that I asked him as one man to another as to whether or not my proposition wasn't fair. Why shouldn't a small contractor work with

his tools if he is employing union help. We discussed this thing at great length. He began to see things my way. He says: "I think your proposition is fair. Especially as you indicate you will have a tile setter and helper and you will only work with the helper and mechanic. Of course, it is up to the arbitration board." Then we discussed two other features in regard to signing it. I asked if he didn't think it was fair for me to complete work I had then contracted for. He says: "Yes." He said: "I will permit you to complete the work you had submitted proposals on." There is quite a lapse of time between the time we submit a proposal. We don't know whether we get a contract for [fol. 141] thirty or sixty days. He was willing to include jobs in the process of negotiation. Then we also discussed Mr. Holly the man working for me now for about two and a half years. I brought out the point that the man was a former union man and a good mechanic. He had worked for me and his services were satisfactory. I couldn't find anything wrong with him and I also felt one of the main reasons he was not in the union was due to the fact that he had to support his family. He couldn't find work with the union so he took it outside of the union.

Q. In other words, Mr. Senn, at this time you are willing to sign this contract, except for article 3?

A. Yes.

Q. You are willing to take any member of the union to work for you? That is up to the union who shall work for you?

A. I wouldn't go that far. The man that the union gives me will have to be a competent mechanic.

Q. Well, you understand, of course, that the union would [fol. 142] only furnish you with competent mechanics?

A. Mr. Schreiber and I discussed that point. Any man that the union would send to me who would not prove competent he would send me another.

Q. Upon you notifying the union?

A. That is it.

Q. And you would pay the union scale?

A. Yes.

Q. And maintain union hours?

A. Yes.

Q. In other words, you would comply with every provision of that contract?

A. Yes.

Q. Except article 3?

A. Yes.

Q. You are ready and willing to do that now?

A. Yes.

Q. And you are able to do it?

A. Yes.

Q. Did you tell Mr. Schreiber that you were willing to do that at all times in your conferences?

A. At all times my position was very clearly stated, I would be willing to sign that union agreement provided article 3 would be changed so I could work.

Q. What you have told us so far is up to and including the 24th of July, the day on which you wrote that letter, which is Exhibit 3?

[fol. 143] A. Exhibit 3.

Q. Now then, did you have—is that correct?

A. Yes, sir.

Q. That conversation you have been testifying to was a conversation just prior to July 24th?

A. Yes, sir.

Q. I notice you wrote Exhibit 4 on the 8th of August. Did you have a conference with Mr. Schreiber between the 24th of July and the 8th of August?

A. I did.

Q. Will you tell us what occurred at that conference?

A. Mr. Schreiber reported to me that the union just couldn't change their agreement; that they had made contracts with eight or nine firms in the city and that those contracts were going to run, I think a period of one year, and they didn't see any need for changing that contract for the benefit of a small contractor, I or anybody else; that was the contract they wanted signed.

Q. What was said, if at all, in the event that you didn't sign up by the unions?

A. Well, nothing definite. Just vague threats "we will have to go after the boys." That was about all. No definite threats were made.

Q. During those conversations you had with Mr. Schreiber, the feeling between you and Mr. Schreiber was good?

A. Yes, I would say so.

[fol. 144] Mr. Padway: I would ask that the word threat be stricken.

The Court: Strike it.

Q. Don't characterize what was said by saying threats.

A. By Mr. Schreiber. He said: "Paul, we will have to step on the boys. We will have to go after them. That is all there is to it. We will use everything that the law will permit us to use." He charged that no violence would be committed and everything would be handled in accordance with the law.

Q. Nothing happened to you after that conference between the 24th of July and the 8th of August?

A. Nothing further that I can remember.

Q. Then you wrote letter under date of August 8th, which is Exhibit 4?

A. Yes, sir.

Q. Now, after you wrote that letter did you have a reply to it?

A. No.

Q. Did you have any further conversation with Mr. Schreiber?

A. I think so. Mr. Schreiber's duties carried him around the city and he stopped in on several of the jobs where I was working and we passed a pleasant ten or fifteen minutes discussing the conditions in the industry.

Q. Was there any further conversation between you and Mr. Schreiber regarding your signing up the contract?

A. Yes. We always said "lets see if we cannot do something" and I always took the same stand. "Charlie, I couldn't do anything. I cannot sign my death warrant. As soon as I sign the contract as it stands I am out of busi- [fol. 145] ness". I always took the same stand. There was no ill feeling with Mr. Schreiber. Finally he tried to intimidate me, or coerce me.

Q. Did you have any conference with anybody else subsequent to the 8th of August than with Mr. Schreiber? When I say any one else, anybody else connected with those unions.

A. I have referred to that meeting we had with the arbitration board.

Q. When was that meeting?

A. That, I think, was in March.

Q. Did you have any further meetings with the arbitration board prior to the 6th of December when the picketing commenced?

A. I don't recall.

Q. Well, prior to the 6th of December did you have any conference with Mr. Schreiber in the month of November?

A. Yes, sir, yes.

Q. Where was that conference?

A. I was working on a job, 68th north of Center, and Mr. Schreiber came into the building.

Q. Will you tell us what the conversation was at that time?

A. The first thing Mr. Schreiber noticed was that I had additional men working there. More than I had formerly employed. And he shook his head. "Oh, this is getting terrible, Paul." I says: "What did you expect me to do, turn down the business when it comes in?" He says: "We ought to get together on this thing." "Well," I says, "my proposition still stands." He said: "Well, I will tell you what you do. You get the small men together," small con- [fol. 146] tractors he was referring to. "Lets see if we cannot work out something with the majority of them." I think if we get a bunch of those fellows together why maybe we can amend article 3 so it is possible for you to sign the contract." The stand I took, I says "Charlie, why should I do your organization. I am not going to my competitors and ask them to do anything. I will paddle my own canoe and they can paddle theirs." We discussed several other things, nothing of great importance and that was the end of the conversation.

Q. Well now, did you see Mr. Schreiber at any other time between that conversation and the morning when picketing commenced?

A. I don't believe so.

Q. When did picketing commence at your home?

A. December 6th.

Q. What time did you first notice picketing at your home?

A. I was out making some calls soliciting business, or making collections, I don't remember, when I was called to the phone and it was my wife and she told me that the pickets were in front of my home. As soon as I concluded my business I drove home and Mr. Schreiber was there with two pickets.

Q. Did you have a conversation with Mr. Schreiber at that time?

A. Yes.

Q. What was your conversation?

A. It was something like this—I don't remember word for word.

Q. Give us the substance of it.

A. He says: "I am sorry we have to do this, Paul. You [fol. 147] know you are growing too fast. When you put on Max Eiler on 68th Street, that was the last straw. We could not permit that." I says: "Well, you fellows are all of age and you know what you are doing, if you think you can get by with this, go ahead." He said: "Well, we are going to keep it up and we will picket the jobs. We will have to do it until the boys get in line." Then I made a threat. I said: "I had had considerable stock of tile on hand. Since the industry was controlled by a big dealers so a small man starting in business couldn't purchase, I made the assertion I had devoted four or five years of my life to the tile industry and I felt that I wanted to continue to earn my living in that industry and if I was going to be forced out as contractor I would enter the brokerage business, I would sell tile to any tile setter who wanted to purchase that tile. To bear out my words I showed him my stock of materials."

Q. You had that in your garage?

A. Yes, sir. He said: "I am sorry you are taking this stand. If you go through with this it will demoralize the industry." I said: "I didn't want to go through with this, but if I am forced to take a step like this in order to earn my living in my chosen profession I will have to. I know the business. I have devoted the five hardest years of my life to it and I intend to continue."

[fol. 148] Q. Now, Mr. Senn, you had some jobs to perform on the 6th of December and thereafter?

A. Yes.

Q. Will you describe what occurred when you would leave your place, your residence, with either your passenger automobile or with your truck?

A. Well, after picketing started on one particular morning I noticed a car standing at the curb with two men in it and when I came out of the alley with my truck why they started to follow me and I immediately surmised those were the pickets. I recognized the car that stood across from my home and I recognized the pickets. I said to myself, they wanted to follow me and I eluded them.

Q. How far did you go before you eluded them?

A. They chased me six or seven times. Sometimes I had to go as much as two miles and sometimes I got rid of them in the first thirty seconds of the chase. It depends on the [fol. 149] trickery we resorted to and whether they could outguess me.

Q. Did they ever get to any place?

A. Not to my knowledge.

Q. What was the longest chase they gave you?

A. About two miles.

Q. How did you elude them?

A. I took streets where they had stop lights and gauged my speed when I came to the crossing, the yellow or change light was on so I could still go through but anybody following would be stuck by the stop light. Then, of course, I made the first turn after that and it was comparatively easy to get away from them.

Q. Do you recall the Sunday of the 22nd of December?

A. Yes, sir.

Q. Will you tell us what happened on that day?

A. Because of the fact that I was being followed I didn't use my truck very often because it is a 1924 Buick and is not very fast. It hasn't much of a get away. I used my car. When I completed a job, of course, I couldn't move all of my equipment in the car, so I decided I would go and move my equipment on a Sunday and I was chased for several miles that Sunday with my truck.

Q. With your what?

A. With my truck.

Q. How did you elude them?

A. I finally made a quick turn and got in the alley behind [fol. 150] that Standard filling station and stood still while they drove past and I lost them.

Q. Did you ever talk to any of the pickets?

A. No.

Q. Did they ever talk to you?

A. No.

Q. You are not making any claims that the pickets were in any way violent while they were picketing your home?

A. Absolutely not.

Q. You live in the corner house?

A. Yes.

Q. When there are four pickets present do they picket both sides of the house?

A. I really never paid much attention to them. Sometimes I noticed when I get home from work or in the house they are walking arm in arm. But sometimes—(Interrupted)

Q. That is, when there are two or four?

A. I was never present when there were four. My wife told me there were four.

Q. What was on the signs?

A. P. Senn Tile Company unfair. Have the union tile setter set your tile.

Q. What Mr. Schreiber said?

A. Yes.

[fol. 151] Q. Now then, picketing of your residence, Mr. Senn, has that been daily, or only on work days?

A. Systematically only on work days.

Q. Has your house ever been picketed on Sundays?

A. No.

Q. On Saturdays?

A. Yes, sir.

Q. Has there been any picketing lately.

A. Last week we had two and a half days of it.

Q. Between the time you appeared in court on the 30th of December and the 7th of January was there any picketing?

A. I don't believe so.

Q. I believe that is all. Cross examine.

Cross-examination.

By Mr. Padway:

Q. Now, you are familiar with the tile setting trade, aren't you?

A. I think I am.

Q. You know that is classed in the building trade as a skilled craft?

A. I think it is.

Q. You know that the building trades put the tile setting trade with the brick layers, masons and plasterers, that [fol. 152] they put the tile division in with those crafts?

A. Yes.

Q. Now, you know too that there is a difference in the tile setting craft between what is known as helper and journeyman?

A. Yes, there is.

Q. You know that a helper is not permitted to do a journeyman's work?

A. I think that is the union rules.

Q. You know that a helper is only permitted to do the work of mixing and carrying of mortar, unpack tile, cutting off the tile and washing and grounding of it?

A. Did you include cutting the tile, Mr. Padway?

Q. Yes, I did.

A. Yes. Yes.

Q. You know that is the helper's work?

A. Yes.

Q. The setting, actual setting of tile is confined to what is known as journeyman tile setter?

A. Yes.

Q. You have been in the plastering game?

A. Yes.

Q. In the building game?

A. Yes.

Q. You know that all of the skilled crafts in the building trades have rules that provide for journeymen and helpers?

A. Yes.

Q. The trade itself, independent of union rules, do employ what is known as apprentices and journeymen and helper?

A. I don't believe the trade. I think it is with the union that the man serves his time.

[fol. 153] Q. You know that the law in the building trades, Florida and Wisconsin, have got and recognize a distinction between master craftsman and journeyman and apprentices?

A. I believe so. I don't know.

Q. You know that the plumbing craft is in the building trades?

A. Yes, sir.

Q. You have worked on houses and buildings, haven't you?

A. Surely.

Q. And so you have seen plumbing work going into the buildings?

A. Yes.

Q. * * * I am going to read to you from the constitution, which is applicable to your business, the tile business.

"All apprentices should attend a technical night school [fol. 154] for one year during their term of apprenticeship or take up a home-study course which shall have been approved by the Executive Board." Do you believe that to be unreasonable?

Mr. Engelhard: Objected to as incompetent, irrelevant and immaterial.

Q. I intend to prove in this case, if the Court please, that this Union has certain laws and rules that govern a practical mechanic. There are certain people known as master craftsmen and journeymen. The Union recognizes a master craftsman and will permit one to work along with the trade. It will not recognize a skilled craftsman, any one who has been, as in this case, eight months to set up as a master craftsman.

Arguments of counsel now made to Court.

Mr. Engelhard: How long have you been a plasterer?
A. Six years in the plastering business.

Arguments of counsel to Court continued.

The Court: How is skill or qualification material under the clause in the contract?

Mr. Padway: For this reason: That is not the only thing that binds the Union. The contract is not the only reason why we cannot take him in as a Union contractor. That is one reason why we cannot take him in. We cannot take him into the Union because he is not a skilled craftsman. That is the second reason, because of our constitution, that [fol. 155] was told him. That was testified to by Mr. Schreiber. The third reason is that he insisted we take in Mr. Holly. Mr. Holly will not be taken into the Union. He is virtually a suspended man.

The Court: I understand, Mr. Senn, has now waived that condition.

Mr. Padway: We won't take him in because he is not a skilled mechanic. Here is the constitution which is as binding as the contract. That rule was made for the purpose of protection.

Arguments of counsel continued to Court.

The Court: Are you going to set up an answer to show that the reason for your picketing is that he has worked

as a helper regardless of any refusal to sign this contract, that he is working as a helper with his man. Is that what you intend to set up, that the picketing did not grow out of the fact that he refused to sign the contract?

Mr. Padway: Both. He must abstain from working as a tile setter.

The Court: Whether he signs the contract or not?

Mr. Padway: Whether he signs the contract or not. Then, if he wants to be recognized as a Union shop he can go on working, he will have to sign that contract because it [fol. 156] provides he will pay such and such a wage; he will recognize such and such working conditions and he will recognize all of the provisions in there. But in this instance we refused. It is not a question of whether we permit him to work. He can work all he pleases, or operate a non-union shop. He has a right to operate a non-union shop. I want to make that as clear and emphatic as I can. It is his legal and definite privilege to operate a non-union shop. That is his legal and absolute right to pay ten cents an hour if he can get them. But it is our right again, the union right, to endeavor to secure from him a union contract, or have him run a union shop. And he can refuse to do it, but we will bring economic pressure to make him do it. We have a right to say you shall pay a dollar and twenty-five cents an hour for the craft.

Mr. Engelhard: We admit that. He says he will pay it.

Mr. Padway: He is willing to do everything we ask of him but the one thing, I won't abstain, or promise to abstain from working with the tools of the trade at tile setting.

Mr. Engelhard: Has he a legal right to do that?

Mr. Padway: Have we a legal right to set up certain rules. One is contained in the contract there because of the demoralized condition of the trade, the union decides it [fol. 157] does not want a contractor, whether he be skilled in the trade or unskilled, to work with the tools of the trade with the men because there is not enough work to go around. We have rule No. 2 in the constitution. If the Court should come to the conclusion we cannot do that, we maintain that the Court cannot, we still say that our people cannot work with him. He wants to run a union shop. He promises to do so. If the Court says "I have held that you cannot prevent him from working with the tools. You cannot have your pickets there. We say he can-

not run a union shop, because we do not recognize him as a skilled craftsman. In other words, we don't consider him a poor apprentice. We don't consider him a half-baked helper. We say we are not going to permit you, according to our rules, to work there.

The Court: Mr. Padway, this discussion arises in connection with the offer of proof. Does the constitution become by implication a part of this contract?

Mr. Padway: The constitution becomes this. The constitution becomes a rule of the union under which——(Interrupted.)

The Court: Does this contract provide that all provisions of the constitution become part of the contract?

[fol. 158] Mr. Padway: No. But the union cannot make a contract contrary to the rules. If the union made a contract in contravention of the constitution it would be expelled by the International.

The Court: Does the constitution permit a skilled journeyman to work with his employes?

Mr. Padway: "Members of the I. U. shall not accept employment with a contractor who works with the tools of the trade unless said contractor is a practical bricklayer, stonemason, cement mason, plasterer, marble mason, tile-setter, mosaic or terrazzo worker."

The Court: Practical workman, does that mean a journeyman?

Mr. Padway: Yes. We have the rules here as to who are journeymen and so on.

[fol. 159] Mr. Engelhard: We will stipulate he has never had the apprenticeship as prescribed by the union. We will stipulate that the three year apprenticeship, which the union requires of apprentices has not been had by Mr. Senn.

The Court: That is all Mr. Padway is seeking to show.

Mr. Padway: Will you stipulate too that the requirements of the union in connection with the attendance on a technical high school during that apprenticeship, or taking up a home study course, which is approved, has not been complied with?

Mr. Engelhard: We will stipulate that as a tile layer he has never gone to night school.

Cross-examination.

By Mr. Padway:

[fol. 160] Q. Now, have you ever had an agreement, either orally or in writing, with the tile setters union as long as you have been in the business to operate a union shop?

A. Did I ever have an agreement with the union, oral or written?

Q. Yes.

A. No.

Q. You have had conferences or discussions with representatives of the union for some years, haven't you, about your shop?

A. They didn't go through the period of years. It was the first year and then several years elapsed and then 1935 I had many conferences.

Q. Did you employ Mr. Nicolai?

A. Yes.

Q. Was he a member of the union?

A. He was.

Q. Did you pay him union wages?

A. I did.

Q. Who else did you employ besides Mr. Nicolai?

A. On that job? The first job?

Q. Any job after that.

A. Approximately one day out of a week, or possibly two days out of a week, I employed my brother to work with me.

Q. He worked with you?

A. Yes.

Q. Is he a union man?

A. He is not.

Q. Has he ever been a union man?

[fol. 161] A. Years back he was a union man.

Q. He was a union tile layer?

A. Not a union tile layer. My brother is not capable of working steadily. His health was ruined due to the war. He is on a pension and I use him as a helper out and also to help me out.

Q. You used him as a helper in your tile laying business?

A. Approximately ten per cent of the time.

[fol. 162] Q. Whom did you employ besides Mr. Nicolai?

A. Mr. Nicolai worked for me for several months I think it was and then Mr. William R. Neidner entered into a

partnership arrangement with me as a partner in the tile contracting business. Mr. Neidner worked with me for a period of four or five months and the partnership broke up.

Q. Was Mr. Neidner a member of the union?

A. I understood he gave up his card when he entered in the tile contracting business.

Q. Who else did you employ?

A. After the partnership was dissolved between Mr. Neidner and I I employed Arnold Holly.

Q. You knew that Arnold Holly had been a member of the union?

A. I did.

Q. When he came to work for you what did you know about it then?

A. I knew that Mr. Holly had had some trouble with one of the union shops with regard to a matter of wages. That he left the employment of that contractor and went to work for a contractor in my same position. In other words, one of the independent contractors not in the down town ring. He had been working for that contractor. I heard he worked for him a week or two. I don't know how long it was. I investigated, I talked to people I knew and found out he was a skilled mechanic. When I arrived at his home and asked whether he was working, he said, "No, he was on the county for some time" and I offered him employment and he accepted it.

[fol. 163] Q. Now, coming back to Mr. Nicolai, you knew that Mr. Nicolai had been fined by the union the sum of $10 for working for you?

A. I did.

Q. You knew that the fine was imposed because he had violated union rules in working for a non-union confractor?

A. I did.

[fol. 164] A. As I understood at that time, a union layer could work on the job with a non-union contractor, but the bone of contention in Nicolai's trouble was, in this case, the union tile layer was working with the non-union contractor who was acting as the journeymen helper. Referring to myself. On that basis I was under the impression Mr. Nicolai was fined.

Q. What is exactly what happened.

A. That was my understanding of it.

Q. He told the truth. You were acting as helper to the journeymen, weren't you?

A. Yes, sir.

[fol. 165] Q. You have worked on Sundays?

A. I did.

Q. You know that that is contrary to union rules, unless there is an emergency?

Mr. Engelhard: Do you take the position here that Mr. Holly and Mr. Senn were in any relationship with the union when they worked on Sunday?

Q. No.

Mr. Engelhard: Objected to as immaterial.

The Court: He may answer.

Exception.

A. I do.

Q. You have also worked longer hours than those recognized by the union as a standard day?

A. On occasions. It is not a general practice by any means.

Mr. Engelhard: And when you did that you were under no contract with the union?

A. I was not.

[fol. 166] Q. You have had pointed out to you in the last year—I mean 1935—by union representatives that—well, the conditions and terms prevailing in the union respecting their craft?

A. You mean with regard to hours?

Q. With regard to wages paid, hours of work, conditions respecting overtime, Sundays and holidays?

A. Not all of them. I knew——(Interrupted.)

Mr. Engelhard: We submit, Your Honor, that the contract proposed to Mr. Senn speaks for itself and shows what wages were and hours and all other conditions he would agree to that.

The Court: Was he familiar with the provisions before he received the contract?

Q. Yes.

A. Before that? They had changed before that and since. Somehow I always found out what the union ruling was.

Q. Now, you told this union, did you not, that you would sign the contract if they deleted paragraph 3?

A. I did.

Q. Then they told you that they couldn't and wouldn't delete paragraph 3?

A. My first real conference with Mr. Schreiber on the subject left me in the state of mind that we would get together on the matter, but Mr. Schreiber left me with the thought in mind. He says: "I think your proposition is fair, but I must take it up with the arbitration committee or board."

[fol. 167] Q. You knew, did you not, that this contract had been entered into with a number of concerns in the city?

A. I did.

Q. Did you send that letter through the mails to various people in this country?

A. I think I sent ten of those letters out.

Q. And the letter reads as follows: "Gentlemen: Would you be interested in purchasing wall and floor tile fixtures from jobber at the same price that tile dealer pays for tile and then employ mechanics to set this material. A show room could be maintained and ample stock kept on hand to satisfy your requirements. If there are enough contractors in Milwaukee County to take a chance on this service it could be started. An early reply would be appreciated. Very truly yours, Paul Senn."

A. Yes, sir.

Q. Did you cause to be inserted in the papers blind advertisements entitled tile setters?

A. I did.

Q. And do you recall when it was that you caused this ad to be inserted in the paper?

A. It was the first Sunday after I was picketed. I don't recall the date.

Q. And this ad reads "Tile setters. Do you want to go in the tile business? Do you want to buy white or colored wall or floor tile trim, or fixtures? Direct them a complete job. Write T 16 Journal?"

A. I did.

[fol. 168] A. * * * The letters and advertisements were also put in the paper and through the mails after the picketing had started.

Q. Well, the purpose of putting the ad in there and sending this through the mails was to sell this tile to persons who would buy it and you would assist in securing the mechanics who would lay it?

A. I had several plans in mind.

Q. That was one of them?

A. That was one of them, yes.

Q. Of course, that means you would put in competition craftsmen or employes with craftsmen and members of the union?

A. Naturally that would be the trend.

[fol. 169] Q. When you came to this city and started in the tile contracting business you paid your employes less than the union scale?

A. I did not. I paid the union scale.

Q. All of the time?

A. I paid the union scale for approximately four weeks.

Q. That is a long time.

A. Shall I recite just what happened after that?

Q. No. Let me bring out the facts as I put the questions [fol. 170] to you and your lawyers will bring out anything.

Mr. Engelhard: We may forget. Let him tell the story so we get it in a connected way.

Q. Let me do it my way. You say you paid the union scale for four weeks?

A. It was somewhere around that time. I am not sure.

Q. Now, in the past year, 1935?

A. Yes.

Q. You paid considerbaly less than the union scale to the men you have employed as tile layers?

A. I did.

Q. The scale was a dollar and a quarter for a journeyman?

A. I believe a dollar in the early first half, or three-quarters of a year.

Q. When the scale was a dollar what were you paying your men?

A. Eight–five cents. Wait. The first few months of 1935 I think I paid seventy-five cents. Then as soon as the volume of business increased I increased my employes voluntarily to eighty-five cents.

Q. At that time the union scale was a dollar?

A. It was.

Q. And you were paying seventy-five cents?

A. Yes.

Q. You paid eighty-five. And it was at the same time a dollar and a quarter an hour?

A. It was still a dollar when I paid eight--five cents. I [fol. 171] had no knowledge of the increase of the rate of pay from one dollar to a dollar and a quarter. I don't know whether the union agreement calls for a dollar, or a dollar and a quarter. I don't know when that increase went into effect.

Q. Weren't you interested in familiarizing yourself?

A. The rate of pay paid was increased during 1935. I am not sure when it was increased.

Q. It was increased April 1st, 1935?

A. In accordance with the proposed contract called for that rate of pay, but it was common knowledge in the industry that a dollar and a quarter was not paid at that time.

Q. I thought you didn't have any knowledge of what the prevailing wage was in the industry?

A. I had the knowledge that comes through the channels of the trade, but I was never familiar with the actual rulings of the union.

Q. When you acquired knowledge through the channels of the trade that the rate of pay was anywhere between a dollar and a dollar and a quarter, you were paying eighty-five?

A. I was. At the time I was paying eight--five I was under the impression that the rate was a dollar. Some months later I heard it was increased to a dollar and twelve and a half cents and then I heard it was increased to a dollar and twenty-five cents an hour. But not officially. I heard the dollar and a quarter officially in August.

Q. The fact is, you were paying less than the union scale [fol. 172] at the time that the N. R. A. went into effect?

A. I paid the code wages during the entire duration of the N. R. A.

Q. You raised your wages to meet the code?

A. I did.

Q. At that time the union wages were higher than you were paying at the time that the code went into effect?

A. If I remember correctly, the union rate of pay was a dollar, prior to the N. R. A. and it was a dollar during the N. R. A.

Q. What were you paying prior to the N. R. A.?

A. When I first employed Nicolai I paid seventy. His pay varied, seventy, or seventy to eight--five, depending on the competitive conditions in the industry.

Q. You paid Nicolai sixty-five, do you recall that?

A. Let me figure. Nicolai worked for me for approximately sixty-five cents an hour. Yes.

Q. Now, at that time the union rate was a dollar, wasn't it?

A. It was. Shall I tell you how I arrived at the sixty-five cents?

Q. I will let your lawyers bring that out. I am not interested in what you were paying your employes.

A. It was not an agreement between the working man and myself, it was a case I paid that man union scale for several weeks. Monday he came and said, "Paul, there is not a tile setter getting a dollar an hour. I am returning some money to you." It was entirely unsolicited on my part. "I don't want to bleed you." I had never talked to that man about hours or rates of pay. It was entirely unsolicited. [fol. 173] I know I was working for other shops. They are getting an hour. When they say they put in eight, they put on eight hours and put in twelve or fourteen to meet the requirements to hold their jobs.

Q. I move that everything that the witness was told by his employe, who was getting sixty-five cents an hour, be stricken as hearsay.

The Court: Strike it.

Q. Coming back to what you know, not what the employe told you.

A. Yes.

Q. You know, or did know that the union scale was a dollar?

A. I did.

Q. You were paying your employe sixty-five cents?

A. I did.

Q. Now, since the N. R. A. came into existence you paid the code of one dollar an hour, is that correct?

A. The arrangements under N. R. A. were that all jobs contracted for prior to the enactment of that N. R. A. could be completed on the same terms and bases provided we submitted a list to our N. R. A. authority. Those jobs I had contracted for I submitted a list in accordance with the rules and completed them and as soon as they were completed the N. R. A. scale of wages was paid on every job.

Q. Now, when the code went out of existence you instantly dropped the dollar rate?

A. Not instantly.

Q. Well, how soon after instantly did you do it?

A. Why, I think it was about a month after that the [fol. 174] rate of pay was dropped due to the fact that the conditions in the industry was demoralized, competition was getting keener and keener.

Q. You dropped it?

A. I did.

Q. To what did you drop it?

A. Seventy-five cents.

Q. Is that the rate you are paying now?

A. No. Just now—— (Interrupted.)

Q. What do you pay now?

A. Eighty-five.

Q. What was the rate in union shops when the code went out of existence?

A. One dollar to the best of my information and belief. I am not positive as to that.

Q. By paying the lower rate to your employes—— (Interrupted.)

A. Yes.

Q. You are able to bid for your work at a lower rate than those who pay the union rate. That is right?

A. Yes, sir.

Q. And in securing contracts through that method union contractors are out that work, at least the possibility of securing it on a competitive basis with you?

A. No. That isn't the case. My biggest competitors are men securing contracts from union shops, their bids, or at least their selling price, is invariably lower than mine.

Q. Selling price?

A. Contract price.

[fol. 175] Q. In spite of the fact that they pay the union wages?

A. I don't know what they pay.

Q. You know that to be the fact that they are people with the union rate of wages who enter lower bids than you enter for the same class of work and job?

A. That is very evident when the bids are opened on competition.

Q. In the last four or five years the building industry has been depressed?

A. It has.

Q. There has been very little activity in the building industry during that period of time?

A. Very little.

Q. The fact is that many tile setters have had to resort to other occupations in order to secure employment by which to live?

A. I assume so.

Q. You know that your man Nicolai had to open a popcorn wagon in order to help himself and family to live?

A. He did.

Q. That is the fact, isn't it?

A. Yes.

Q. You knew that some of the craftsmen were on relief?

A. Yes.

Q. You knew too that there is a fair revival in building, particularly residence building at the present time, and for a few months past?

A. In 1935—the year 1935 showed a considerable increase over '34.

[fol. 176] Q. You have stated, I believe, if you have not I want to ask it of you again, that you consider the tile laying business a skilled craft. That is right?

A. Are you asking what I considered qualifications of a man in the business?

Q. Well, what is generally understood in the building line about the particular craft known as tile layer? Is it or is it not considered a skilled craft?

A. There are two different opinions regarding that. The opinion of the established firm is that you must be a skilled craftsman. People paying the bills, contractors and owners, feels if the man is qualified as contract tile layer he is qualified to be in the business.

[fol. 177] Redirect Examination.

By Mr. Engelhard:

Q. Mr. Senn, you have been setting tile or working as a helper with your own tools for the past five and a half years?

A. Yes, sir.

Q. What were some of your biggest jobs? What was the biggest job you have done as a tile setter, in which you did the tile setting exclusively?

A. Well, I usually work with others, but on the biggest job I ever did after Mr. Holly was taken sick and I had to continue alone, whether I wanted to work or not, I put in two bathrooms out of the six we put in the home.

[fol. 178] Q. How much of the seven hundred and fifty hours that you put in yourself was tile setting as distinguished from the work of a helper?

A. Oh, I dare say the way we have been working where Mr. Holly made his own cuts and did little things where a helper ordinarily would help him, I would say between fifty or sixty per cent was devoted to the setting of tile. More than half.

Q. More than half of the seven hundred and fifty hours?

A. Yes, sir.

Q. Do you know of any job which you got as a contractor upon which you did not set tile during 1935?

A. There may have been one. I went out of the city for a few weeks and left Mr. Holly and another man working. I don't recall.

Q. Do you recall any job upon which you did any work at all that you didn't do work as a tile setter?

A. No—may I have that question again.

Q. (Question read.)

A. I do not.

[fol. 179] Q. I understand your testimony to be that you indicated to Mr. Schreiber and another member of the union who conferred with you about the contract that you had no objection to paying the union wage and maintaining union hours?

A. That is correct.

Q. To maintain and carry out all parts of that agreement except article 3?

A. Correct.

Q. You are ready, willing and able to do that today?

A. I am.

Q. All you want is the right to work with your tools and your hands?

A. Yes.

Recross-examination.

By Mr. Padway:

Q. This is the letter. We will have it marked. "Milwaukee, August 23rd, 35. Secretary J. J. Gleeson. Dear Sir and Brother: In answer to your letter of the 19th inst.,

wish to state that Sec. 6 of Article 20 of the I. U. Constitution covers Mr. Senn's Complaint.

"He was a plastering contractor, a non-union one at that, before entering the tile business.

"He has consistently hired non-union tile setters and acted as helper and slowly broke into the game, and we feel that he either be a tile contractor or go back to plastering. Fraternally yours, Charles Schreiber, Secretary."

Letter received and marked Defendant's Exhibit No. 1, in evidence.

[fol. 180] Q. Has the union ever said to you that you cannot work at your trade of tile setting?

A. I have been informed on that score repeatedly in connection with the union agreement.

Q. Is this not the fact. The unions said in order to secure a union agreement and have union men work for you you shall not work with the tools of the trade?

A. I don't get clearly your question.

Q. Has any representative of the union, independent of the union agreement, get that?

A. Yes.

Q. Ever said to you, you cannot work with the tools of the trade?

A. Shortly after I wrote the letter to Mr. Gleeson, Mr. Schreiber stopped in on one of my jobs and we started talking about this. He inferred—he said, he didn't think there would ever be a chance of my using the tools. I says: "Why?" "In the eyes of the union you are not a bona fide journeyman tile setter." I says: "Charley, how long must this go on?"

Q. That was in connection with securing a union contract and union men?

A. We discussed that among other things.

Q. Did the union, Mr. Schreiber, or anybody else, Milville, ever say to you that you cannot work with the tools of your trade?

A. Yes. I have been told that by men who were formerly in the unions.

Q. Those men told you this, did they not, that as a union contractor you cannot work with the tools of the trade?

A. The gist of what they told me was. No matter how long I would be in the business, the tile setters union would never recognize me as a tile setter.

[fol. 181] PAUL SENN, plaintiff, recalled in his own behalf, testifies as follows:

Direct examination.

By Mr. Lamfrom:

Q. This contract, Mr. Senn, which was sent to you in March, 1935, by the union.

A. Yes.

Q. Did you approach the union prior to that time and ask them to enter into any contractual relations with you?

A. I did not.

Q. Did you at any time ever ask the union for the right to enter into a contract with them?

A. I did not.

Q. Are you—I think you testified on your direct examination that you are willing to enter into a contract with the union, that contract which is Exhibit 1, if the union does not insist upon having that clause in it in which you would give up the right to work in your own business?

A. I am.

Q. Is that true?

A. Yes, sir.

Q. I think that is all.

[fol. 182] Recross-examination.

By Mr. Padway:

Q. Did you not ask Mr. Melville whether you could secure help on union conditions and union terms?

A. I did.

Q. Did he not tell you if you would agree to enter into a union contract it would supply the help?

A. The contract was never mentioned.

Q. Didn't he tell you if you complied with union rules as prescribed for other contractors you would get the help?

A. Yes, he did.

Q. Did he not thereafter come to see you on some of your jobs and talk to you about a union contract and union help?

A. Yes, he did.

Q. Didn't he come out to one of your jobs on Lake Drive and protest that you were employing Nicolai contrary to union rules?

A. He didn't have a chance to protest.

Q. You drove him off the premises with loud language or oaths?

A. I don't know whether I used oaths or not, but I had the owner's permission to keep everybody connected with the tile industry off that job because some one connected with the tile industry threatened dire results.

[fol. 183] JOHN D. EDWARDS, sworn, testifies in behalf of plaintiff as follows:

Direct examination.

By Mr. Engelhard:

Q. Mr. Edwards, what is your occupation?

A. I am a builder, contractor.

Q. How long have you been in the contracting business?

A. Twelve years.

Q. You came up this noon into the court room here?

A. I did.

[fol. 184] Q. When did you talk to Paul Senn last?

A. I think about three months ago.

Q. You read about this case in the newspaper this morning?

A. Right.

Q. That induced you to come up here and volunteer to testify?

A. That is right.

Q. Did you employ Mr. Senn as a subcontractor?

A. I did, yes.

Q. During what years?

A. 1933 and '34.

Q. And about how many jobs did he do for you?

A. Why, I would say a dozen.

Q. Among those jobs were there any expensive homes?

A. There were several.

Q. Will you mention them?

A. The jobs that were just mentioned. Martin Paulsen job and A. F. Millard job.

Q. Did you observe as to who set the tile on the two jobs?

A. Yes, I did.
Q. And the other gentleman?
A. Yes, sir, Mr. Senn did it mostly.
Q. Anybody else assisting him?
A. Yes.
Q. Now, what was the type of workmanship that Mr. Senn did?
A. I would say it was first class.
Q. These tile jobs were in connection with what parts of the home?
[fol. 185] A. Well, there was all types of tile work. There was wainscotting, sinks, and floors, windowsills.

Cross-examination.

By Mr. Padway:

Q. You say you talked to Mr. Senn the last time at what time?
A. About three months ago.
Q. You read of this case in the paper you say?
A. I did.
Q. What paper?
A. The Chicago Tribune this morning.
Q. Whom did you telephone about coming up here?
A. I didn't telephone to anybody, I came.
Q. At what hour did you come?
A. Oh, about 1:30.
Q. Did you come for the purpose of testifying?
A. No.
Q. What prompted you to come here?
A. Well, I was interested. The article I read this morning indicated to me the intent on the part of the union to refuse a man the right to work himself on the job and I had a personal opinion in connection with that. I never subscribed to that idea and don't now. When I came here I volunteered to testify as to the quality of Mr. Senn's work.
Q. Do you build houses for yourself, or for others?
A. Both.
Q. You knew Mr. Senn was a non-union contractor when you employed him?
A. In the home building business we never paid much attention to whether union or non-union contractors.

[fol. 186] Q. When was the last time you built a home building in this city?

A. I am building three or four of them right now.

Direct examination.

By Mr. Lamfrom:

Q. In your opinion, Mr. Edwards, was Mr. Senn competent to do the tile work for which you engaged him during the period during which he worked for you?

A. Entirely so, yes.

Q. That is all.

CHARLES SCHREIBER, recalled adversely for plaintiff, testifies as follows:

Examination by Mr. Lamfrom:

Q. Mr. Schreiber, what is the present purposes of the union in picketing Mr. Senn at the present time?

A. Our union, or rather the trade of the tile layers for the last two or three years has been so demoralized by the outside fellows cutting into our trade, which don't belong, and even those who do go out contracting, and our union is so developed we have to do something to try to eliminate [fol. 187] that source of supply we will say.

Q. Then the purpose of picketing Senn at the present time is to eliminate what you call a source of supply in the union situation?

A. To sort of in a way, yes. To have him come into the union shop drop his tools and hire union labor to do the work for him.

Q. In order to consummate such a relationship, if you are successful in contravening this petition he would have to sign the contract you sent him?

A. Yes.

Q. Suppose Mr. Senn was willing to sign the contract as you sent him without the third clause?

A. He cannot.

Q. I know that. Let's get that clearly. It covers the laying down of his tools?

A. They are not his tools. That is the argument.

Q. I understand it there.

A. Well, we don't. They are not his tools.

Q. Let-s not have a dispute. Wait until I finish with the question. I will rephrase it.

A. That is better.

Q. Assuming that Mr. Senn would be perfectly willing to sign this contract, which is in evidence here, which the union sent him without clause 3 included in it, would that be satisfactory to the union?

A. No.

[fol. 188] Q. Then the only way that Senn can make peace with this union at the present time is by signing the contract, which you sent him, as it is written?

A. As the other ten or eleven contractors in this town did. Yes, sir.

Q. I am not concerned with the others. But with this contract as it is written. Is that right?

A. Yes.

Q. Well, that is all.

A. That is all.

Q. I told you it wouldn't take but a minute.

The Court: You said they were not his tools.

A. When he struck this town, 1931, he was a plastering contractor. He picked up a little of the trade in Florida. That can help, six months, but the fundamentals he did not know. He took one of our men contrary to our union. We didn't know that. But we have a stringent rule, at no time can a contractor act as helper for the simple reason —to cover a case of this kind, anybody, we have offered in this case, anybody off of the street that the tile business looked pretty good—I don't know what attracted him to the tile industry. This man he took knowing he couldn't work as helper. We went on this particular job and told our man you cannot work with Mr. Senn. He has to be a contractor and you have to do the work and hire a union tile setter. We found those men done this work for him, union helper being boss acted as helper. This man kept on dragging along. When he lets out that Mr. Nicolai he picked up another former member. Neidner. He kept him on. He kept on doing that. That Mr. Holly, I would [fol. 189] say in doing a bathroom he could accomplish it. In the start, 1931, Mr. Senn was not a tile mechanic in our eyes. He never was a tile mechanic. He was a plasterer,

or civil engineer, from the time he left school. He never was a tile layer by trade.

The Court: That is what you mean by that expression, his tools?

A. By our tools. Yes, sir.
Q. That is all.

Mr. Engelhard: Plaintiff rests, Your Honor.

FRANK D. MELVILLE, sworn, testifies in behalf of defendant as follows:

Direct examination.

By Mr. Padway:

Q. I have the answer now, Your Honor.

Answer of defendants now filed.

The Court: Yes, I have it, Mr. Padway.

Q. Mr. Melville, you are the president of the union here, the defendant in this case?
A. I am.
Q. Do you recall when you had your first talk with him?
A. Well, I couldn't give the exact date, but the year was about 1931, I would say.
Q. How long had he been in the city at that time, if you know?
A. How long had I been here?
Q. He, Senn.
A. That I couldn't answer. I don't know.
Q. How did you happen to meet with him at that time?
A. He gave me a call and told me his name and said he was thinking of going into the tile business and wanted to see me.
[fol. 190] Q. Did you go to see him?
A. No, sir, he came to see me.
Q. What did you say to him and he to you?
A. I explained things to him the way we were working. As I recall, as a matter of fact, we had no signed agreement with the employers. It was only a gentleman's

agreement. However, we had them all signed up. I explained it. He agreed to go along. He agreed to hire tile layers and helpers the same as any other employer was getting and I told him he could get men.

Q. He agreed to do that?

A. Yes.

Q. He agreed to work on the same basis as other tile contractors at that time?

A. Yes.

Q. What did you say to Mr. Senn and to Mr. Nicolai?

A. I told Mr. Senn that this fellow was working in violation of one of our rules and was subject to a fine if he continued.

Q. Did you explain the rule to Mr. Senn?

A. Undoubtedly and also to Nicolai the same thing, which he knew, of course, before I notified him.

Q. Did Mr. Senn comply with the rules thereafter and employ a union helper with Mr. Nicolai?

A. No, sir.

Q. Did he continue to employ Mr. Nicolai without a union helper?

[fol. 191] A. Yes, sir.

Q. Was that a violation of the rules?

A. Yes, sir.

Q. Did the union impose a penalty on Mr. Nicolai for that violation?

A. Yes.

Q. What was the penalty imposed on Mr. Nicolai for the violation?

A. How much?

Q. Yes.

A. $10.

Q. Was it ever paid?

A. No, sir.

Q. And did Mr. Nicolai continue on working for Mr. Senn?

A. Yes.

Q. The trade was pretty well depressed from 1931 to 1935?

A. Yes, sir.

Q. 1935 building operations revived somewhat?

A. Yes.

Q. You came and talked to Mr. Senn, didn't you?

A. Yes.

[fol. 192] Q. Did you inform Mr. Senn that other contractors in the city had entered into what is called a union contract?

A. Yes.

Q. And without repeating the names again, Mr. Senn recognized them, those read. Are those the firms operating under a union contract?

A. Yes, sir.

Q. Are those firms—do any of those firms have as members of the firms officers or partners what is known as practical craftsmen?

A. Have any of the practical craftsmen?

Q. Yes.

A. Yes, sir.

Q. Men who have worked as apprentices and journeymen?

A. Yes, sir.

Q. Do any of these firms employ their head men, or officers, or partners as craftsmen in the industry since they signed the contract?

[fol. 193] A. No, sir.

Q. They have agreed not to, have they?

A. Yes.

Q. Now, is there a dearth, or has there been a dearth of work in the industry for the last few years for craftsmen?

A. Very much so, yes.

Q. Now, if an employer is engaged in the industry, has that a tendency to lessen the number of union men who may be employed in the industry?

A. Naturally, yes, sir.

Q. And the purpose of that requirement is, to give more work to the members of your craft?

A. That was our aim, yes, sir.

Q. Now, have you—how long, if you know, has this requirement been part of the constitution and rules of order of the International Union to the effect that the union employe cannot work with a contractor who works with the tools of the trade, who is not a practical craftsman? Have you any idea how long that has been the rule?

A. As far as I recall. I won't speak positive, but I think that was there since we have been affiliated with the Bricklayers & Masons Union. 1918, July.

The Court: You are referring to the provision in the constitution?

A. Yes, sir. He asked me how long that was in the constitution.

Q. Has that rule ever been set aside by your local union?

[fol. 194] A. Not to my knowledge.

Q. You, as an officer of the union, have had several conferences in 1935 with Mr. Senn?

A. Yes.

Q. And he admitted this morning that he was not operating a union shop?

A. Yes.

Q. Right, What has been the feeling on the part of the [fol. 195] union, whether he has endeavored to take union men and employ them?

A. What has been the feeling today, him doing that, not very kindly, of course.

Q. That is a grievance you hold against him?

A. Yes.

Q. You characterize him as an unfair employer?

A. Yes. Right.

Q. If he will sign this agreement what is the attitude of you—of the union with respect to wiping the old past grievances and putting him on the fair classification, has the union proposed to do that?

A. I believe if Mr. Senn would go this afternoon to Brother Schreiber and offer to sign the contract as it stands we will forgive him.

Q. You would condone the past offenses?

A. Absolutely.

Q. If he doesn't do that what is the attitude of the union? Do you maintain to hold on the past?

A. We will do anything, of course, to harass and put things in his way.

Mr. Lamfrom: What do you intend to do?

Q. Harass, do you mean by that, by unlawful means?

A. No.

Q. What you mean is to be specific, you intend to announce to the world that he is a non-union contractor and should not be patronized on that account?

[fol. 196] A. Right.

Q. You intend to picket his place of business, which, in this instance is at his home, so as to bring that information to the world?

A. Yes, sir.

Q. Or anybody who is interested in it?

A. Yes.

Q. If you ascertain where he has jobs to picket those jobs?

A. Yes.

Q. In that way you intend to harass and to bring pressure to bear upon him to become a union contractor?

A. Yes.

Q. So that there be no mistake. You will not put him in the category of a union contractor unless he agrees to lay aside the tools of the trade and not work with them?

A. Right.

Q. And the reason for that is because you do not consider him a skilled craftsman, but because you have exacted that condition free from the other contractors whose names you have mentioned and who have signed that contract?

A. Yes, sir.

Mr. Lamfrom: Exacted?

Q. Aside from the society. You describe that contract?

A. Yes.

Q. You believe that to be highly beneficial to your trade to have the contractor, even though a craftsman, to restrain from work?

[fol. 197] A. It takes men off relief.

Q. Is it part of the union's function to give a skilled craftsman to the trade and public?

A. Absolutely.

Q. You heard Mr. Senn state he would want a competent craftsman?

A. Yes, I did.

Q. I notice that article 3 of your constitution, which sets forth the objects for which you are formed, contains this. "The object of this union is to encourage a higher standard of skill, to cultivate feelings of friendship among the men of our craft, to assist each other to procure employment, to reduce the hours of daily labor, to secure adequate pay for our work, and by legal and proper means, to elevate the legal, moral, intellectual and social conditions of our members."

To you- knowledge does the union fulfill that purpose?

A. Yes, to the best of its ability.

Q. Do you encourage a higher skill among the men?

A. Yes. If there is a question about it, between employe and employer, we have a committee and if it is decided against the man he does it for nothing. In fact, we insist upon it.

Q. How many members have you in your union at this time?

A. Forty-one, I believe, to be exact.

Q. I am speaking now of journeymen.

A. Forty-one.

Q. Do you know how many there are in the helpers' union?

A. I heard the other day. I think it is a little less than [fol. 198] that. Perhaps, thirty-two or thirty-three I was informed.

Q. When the trade is sufficiently busy and the helpers required sufficient skill and knowledge, you take a man from the helpers union into the journeymen?

A. Yes, sir.

Q. You examine him and take him in?

A. Yes, sir.

Q. Now many members did you have in the union in 1929?

A. Well, I think we had something like a hundred and twelve, or thereabouts.

Q. What has been the tendency recently, if you know, of it, of some of your former members to become contractors?

A. Well, a few of them have attempted to go into business. In fact, they have some of them, but they didn't get very far so far. None of them have been able to do very much.

Q. Will it have a detrimental effect on your union if the [fol. 199] men start*ing* quitting and going into the contracting game?

A. Absolutely.

Q. What would be the method of protecting the self interest of the union members in that regard? Perhaps, I don't make myself clear. Is clause three prohibiting the men there, the contractor, from using the tools?

A. Yes, sir.

Q. In other words, they might all might become contractors?

A. Yes, sir.

Q. And no longer members of the union at all?

A. Yes.

Q. Would that tend to bring down the wage standards?

A. Absolutely.

The Court: We will take a short recess.

Afternoon recess had.

Q. Now, did you talk to him about the rule in your constitution that doesn't permit any contractor to work as a helper, regardless of his knowledge in the trade?

A. Yes, sir, he was familiar with that.

Q. What did he say whether he would or wouldn't abide by that rule?

A. He simply stated, as far as I recall, he felt he could assume that right. He, as an employer, would do any part of the business he saw fit.

Q. In other words, he gave you to understand he would not forfeit that right to work as a helper if he saw fit?

A. That is right.

[fol. 200] Redirect examination.

By Mr. Padway:

Q. By the way, what is the cost of a fair set of tools of the trade?

A. Cost?

Q. Yes. If you went out and had to buy a complete set of tools in your trade what expenditure would you have to make?

A. Well, I think -12 or $14 without the container would be a fair price.

Q. You wouldn't need $700?

A Oh no. I will sell mine for $15.

Mr. Engelhard: You don't mean to say he has $750 worth of tools. He has equipment and automobiles.

Q. Pardon me.

Recross-examination.

By Mr. Engelhard:

Q. You stated to Mr. Padway that it was your duty to protect yourselves against unfair contractors by insisting upon this provision in the contract that they do not work themselves, either as tile setters or as helpers?

A. Fair contractor and also the larger ones. It doesn't [fol. 201] make any difference.

Q. It doesn't make any difference whether skilled or unskilled contractor?

A. There are none except the skilled are permitted to work.

Q. Well, your demand which you say, the contract which you say you exacted from the other contractors prevents them from doing any work whatsoever, whether skilled or not?

A. Yes, that is right.

Q. That is, what you are also attempting to exact from Mr. Senn?

A. Yes, treating them all alike.

Q. Unless he signs the contract with that exaction in it you will see that he is run out as a contractor?

A. Or signs other agreement.

Q. You intend to put him out of business if you can?

A. No. I never made such a statement.

Q. You want to harass him, or anybody who does business with him?

A. Yes.

Mr. Padway: There is no such testimony.

Q. You intend to harass the architects who do business with him?

A. That is our original program, yes.

Q. And it is still your program?

A. Yes.

Q. You intend to harass the subcontractor?

A. Yes, sir.

Q. You intend to harass——

A. I suppose any place at all we can get to make it effective.

[fol. 202] Q. To make it effective you want to make—create a condition where he cannot get any more work?

A. It is not our aim.

Q. You don't want people to deal with him?

A. No, we will try—— (Interrupted.)

Q. You want to get the situation where Paul Senn either is not going to be a competitor of your men, or he signs up, isn't that correct?

A. That is our aim to get him to sign it.

Q. In order to effectuate—in order to arrive at that aim you are picketing his home, or any job he may get in the future?

A. That is our aim to get him to sign it. It is not our aim to put him out of business.

Q. But you would not be picketing—— (Interrupted.)

A. We expect that to become effective. We don't care who gets the business as long as we get the employment.

Q. Well, Mr. Melville, you caused a letter to be sent to all of the architects and contractors?

A. Well, I didn't personally. The organization did.

[fol. 203] Q. You know about the letter?

A. Yes.

Q. In which you threatened that you would picket the offices of contractors and offices of architects?

A. I think it was.

Q. It is your intention to do that if Mr. Senn doesn't sign a contract?

A. Perhaps so, and perhaps not. We have not got that far yet.

Q. You have not got that far according to the testimony of Mr. Schreiber because you weren't able to find out what jobs he had.

Mr. Padway: Where is the letter.

Mr. Lamfrom: Here it is. "Tile Layers' Protective Union, Local No. 5, Milwaukee, Wis. Affiliated with Bricklayers and Plasterers International. July 11, 1935. Dear Sir: Some time ago we presented to each individual tile contractor in the city a copy of our new agreement, in which we specified what constitutes a bona fide contractor and who should install the work.

"Not having heard from some of these so called tile contractors in a given time, we beg of you to contact the list of fair contractors listed below in awarding the tile work in your building operations. If in two weeks time anyone outside this list is awarded tile work we will then picket such jobs, contractors' or architects offices, or employ other lawful means to help us in our fight to better the conditions of our trade.

"The firms working in harmony with us are as follows: [fol. 204] Butler & Sons Co., Cafemeyer Brothers, U. S. Durner & Co., Midwest Tile Art Co., Milwaukee Tile & Mosaic Co., H. Neidner & Co., Stark Mantel & Tile Co.

"Hoping you will cooperate with us, we beg to remain Very truly yours, Tile Layers Protective Union No. 5."

Mr. Padway: Show me what architects or what contractors office was picketed?

Mr. Lamfrom: We contend that this letter, which was sent out, is a threat. If Mr. Senn is continued on the unfair list, if he gets any jobs that they will picket the architects and the jobs, and anybody else connected with the matter. We cannot think of anything that is plainer. It is written and sent broadcast.

Q. Mr. Schreiber testified on cross-examination that they would picket the offices of architects and contractors and jobs, when and if they found out where he has a job, and when they found out who the contractors and architects are.

Mr. Lamfrom: It is all in the record. We cannot alter it.

Q. That is all.

[fol. 205] Q. • • • Has the union taken any position, or have you intended to put into effect what is set forth in that letter, that you will picket jobs or contractors offices or architects?

A. The parties in charge of that have power to do as they see fit in as far as the union is concerned.

Q. Has the union taken any position that they would do that?

A. No, not on record as such. I don't think so. I say that the executive board has power. At least they have to do it.

Q. Have they taken any such action?

A. No.

Q. As far as you know does it intend to take any such action?

A. I don't think so.

Mr. Lamfrom: Why did the union write that?

A. They were, perhaps, spelling the big and heavy. I don't know.

Mr. Lamfrom: Who is the big and heavy?

A. I suppose the executive board or business agent. I didn't happen to write that. If I did I would say so.

Q. That is all.

[fol. 206] HERBERT SEBASTIAN, recalled, testifies in behalf of defendant as follows:

Direct examination.

By Mr. Padway:

Q. Are you a member of the helpers union?
A. Yes.
Q. Business agent?
A. Yes.
Q. Are you a helper or tile layer?
A. Helper.
Q. How long have you been a helper?
A. Enough. Well, at least nine years; somewhere around nine years.
Q. You are not a journeyman yet?
A. No, sir.
Q. You have to serve an apprenticeship before you became a journeyman?
A. Yes.
Q. How many years will you have to serve in addition to your years as helper?
A. Three years.
Q. Before you become a journeyman. From what you know of the helping line did you learn enough about the tile business so with the journeyman you could work along and set a piece of wainscoting if permitted to?
A. Well, it all depends on with the helping you learn the idea, but if you come to do the actual work it is all a different story.
Q. If a journeyman let you work along and showed you a few tricks of the trade, do you think you could learn something about it?
[fol. 207] A. You learn as you go along.
Q. And could do it. You could with the journeyman set a piece of wainscoting today?
A. After eight years service I should be able to do a little something.
Q. You don't feel that entitles you to be classified as a practical tile setter?
A. No, sir, absolutely not.
Q. You understand by the union rules you are not supposed to do that work even if you can do it?

A. I am not supposed to do it.
Q. Because it belongs to the journeymen craft?
A. That is right.
Q. Your own rules provide it?
A. Yes, sir.
Q. That is all.

[fol. 208] ARNOLD HOLLY, sworn, testifies in behalf of plaintiff in rebuttal as follows:

Direct examination.

By Mr. Engelhard:

Q. Mr. Holly, you are an employe of Mr. Senn at present?
A. Yes.
Q. During the time you have been working with Mr. Senn, for Mr. Senn, you have been working with him in the setting of tile?
A. Yes, sir.
Q. You would work in one room and he might be working in another room?
A. Sometimes.
Q. And sometimes you worked together in the same room?
A. Together.
Q. You observed what kind of work he was doing during the two and a half years that you have been employed by him?
[fol. 209] A. Yes, sir.
Q. Now, what have you to say as to Mr. Senn's work in any particular of the classifications in which you have been employed by Mr. Senn?
A. Well, I wouldn't say it was any different.
Q. That is, you and he do the same kind of work?
A. Yes, sir.
Q. You have done hearths?
A. Yes.
Q. You have done staircases?
A. Yes.
Q. You have done floors?
A. Yes, sir.
Q. And walls?
A. Yes.
Q. Windowsills?

A. Yes, sir.
Q. Ceiling work?
A. Yes, sir.
Q. Bathroom work?
A. Yes, sir.
Q. Tile sinks?
A. Yes, sir.
Q. Bulkheads?
A. Yes, sir.
Q. Mosaics?
A. Yes, sir.
[fol. 210] Q. Window stools?
A. Yes, sir.
Q. Now, you prepared and set all concrete?
A. Yes, sir.
Q. Or does the helper do that?
A. No, I do.
Q. You do that?
A. Yes, sir.
Q. The brick work or other foundations, or materials that may be required to properly complete that work?
A. Yes, sir.
Q. Setting and putting of all tile?
A. Yes, sir.
Q. Stone and marble?
A. No.
Q. And composition?
A. Composition.
Q. Glass?
A. Not on any occasion I had glass.
Q. Mosaic?
A. Yes.
Q. Mosaic in these days, the design is done on a piece of paper?
A. Yes, sir.
Q. Or other material forming the face hearth or fireplace on a mantel?
A. Yes, sir.
[fol. 211] Q. Or a mantel complete?
A. Yes.
Q. Counters?
A. Yes, sir.

Q. Tile designs of every description?

A. Yes, yes, sir.

Q. You erect and install the same?

A. Yes, sir.

Q. Do you build, shape—did you build, shape and form construction repair fireplace work?

A. Yes, sir.

Q. Whether it was in connection with the mantel hearth, or facing or any?

A. With the mantel.

Q. Ever set any marble?

A. Yes, sir.

Q. Did Mr. Senn do any of these things with you?

A. He did, I would say, over sixty or seventy per cent of those things. I will say the other percentage is very low that you probably do, that the tile worker does.

Q. Can you tell us to what extent Mr. Paul Senn put in tile work in any of the contracts that he performed with your assistance, or without your assistance?

A. He has put in wall tile without my assistance and he [fol. 212] has put in floor tile without my assistance. He has did tile sinks.

Q. How about mantels?

A. Mantels. I cannot say if he worked on a mantel, but he put in hearths without my assistance.

Q. You and he have worked together at the same time?

A. When we put in the mantel, that we have.

Q. What have you to say as to whether or not the work he did as a tile setter was skillfully done, or unskillfully done?

A. He did it as skillfully as a tile setter would do it.

Q. Did he do it as skillfully as you would do it?

A. Yes.

Q. Then—before you worked for Mr. Senn you worked for other contractors?

A. Yes, sir.

Q. Did you work for contractors who had more than one journeyman?

A. Yes.

Q. You observed their work?

A. Yes.

Q. And your own work?

A. Yes.

Q. Would you say from your knowledge of what Mr. Senn has been doing during the last two and a half years as a tile setter that he is a practical tile setter?

A. I would say so.

Q. That is all.

[fol. 213] January 15, 1936, 10 A. M. Trial resumed.

Messrs. Lamfrom & Engelhard in behalf of plaintiff.
Joseph A. Padway in behalf of defendants.

PAUL SENN, recalled in rebuttal.

Direct examination.

By Mr. Engelhard:

Q. You specialize in home work rather than commercial buildings?

A. Yes. In fact, in the last eight months I have not had to solicit any business at all. Every bit of business I did came to me by people who knew of my services, whom I had worked for before, over the telephone. I have not gone into an individual office since May or June and asked them if they had tile work for me to work on. Every bit of the work I have done and some incompleted came to me by people who were familiar with my work and I had done work for. "Paul, I have a job for you to figure. Come on over."

Q. In 1934 you did how many jobs?

A. I have four children in my home and I found out that some of the records are not as complete as I would like to have them. But the records for March and April and August have disappeared entirely. But irrespective of that disappearance I have a record of twenty-six. Going back to August '35, and from my experience of previous months, [fol. 214] of August, that has always been my biggest month. I took three times as much business in August as I do in any other month of the year. I think I can safely say I did not less than forty jobs in 1934.

Q. That is the year you did the work in the home for Martin Paulsen?

A. Yes. That was another one of the homes I had two bathrooms on one floor and Mr. Holly worked on one and I on the other.

Q. You also did work in the home for Mr. Millard?

A. Yes, that was another job where we had several bathrooms on one floor.

Q. In '33 how many jobs did you do?

A. I didn't check back in the records. It was getting pretty late last night. But I think I could conservatively say I did not less than thirty.

Q. And '32?

A. About twenty-five.

Q. And in '31?

A. '31 was the first year. I don't think I did over ten.

Q. So you can say that during the time you have been doing this tile work you have done a hundred and fifty to a hundred and seventy-five jobs?

A. Yes, I could say that.

Q. Out of the one hundred and seventy-five jobs how many would you say were done by you as a principal contractor, where you and the owner got together on the job?

A. I made a statement yesterday I thought I did about a fourth of my work for architects. But in going over my [fol. 215] records I find many thousand dollars I was hired directly by the owner. There was no architect on the job. I dare say forty per cent of the work from owners.

Q. The others is done through subcontract?

A. Yes, subcontracting.

ABRAHAM AUWENEEL, sworn, testifies in behalf of defendant as follows in surrebuttal.

Direct examination.

By Mr. Padway:

Q. What is your trade?

A. Tile layer.

Q. How long have you been a tile layer?

A. Thirty-eight years.

Q. How long have you worked at the trade in this county?

A. Well, about the same amount, excepting two years. Thirty-six years about.

Q. Now, as a tile layer you had occasion to do some of the bigger jobs in this county?

A. Yes, sir.

Q. Do you feel that a man, who worked in house work exclusively with other tile layers for the last five or six years,

can hold himself out as a competent skilled craftsman in the various classes of tile laying required in this county?

A. I would say not if he had no experience.

[fol. 216] Q. Working with other men and laying tile in a household, would you say that the tile work performed in the average household in this county in the last five years would be sufficient to qualify a man in your craft as a craftsman?

A. Do you mean an all around mechanic to do any part of the trade?

Q. Yes.

A. No, I wouldn't.

Q. And are there differences even in the ordinary household jobs that require knowledge and skill in the craft to perform that work?

A. Not in the ordinary housework as it is done today.

Q. Now, having in mind the term, practical tile layer as understood by you as a union man and your unions, is a man a practical tile layer within the union rules and qualifications who entered the business as a contractor and worked on household jobs with journeymen tile layers and in that way acquired his knowledge of laying tiles in residences?

A. Do you mean, do I consider him a practical mechanic to do every branch of the work?

Q. Practical mechanic under union rules.

A. I wouldn't say so.

Mr. Engelhard: You wouldn't?

[fol. 217] A. No.

Q. You wouldn't consider him such?

A. No.

Q. Is a journeyman required to be a practical man?

A. Yes, sir.

Q. Required to do work other than household work?

A. Yes, sir.

Q. Some different work, I mean?

A. Yes, sir.

Q. A contractor who works with the tools he can work any hours?

A. He suits himself.

Q. You have no disciplinary rules over him?

A. No, sir.

Q. He can work twelve or fourteen hours, or Sundays, or whenever he pleases?

[fol. 218] A. Yes.

Q. By doing that he would be depriving your men from employment?

A. Yes, sir.

Mr. Lamfrom: He would be getting work for himself though.

Q. He would be depriving your men of employment?

A. Yes.

Q. The union is opposed to that?

A. Yes.

Q. There has been a dearth of work in the last four or five years?

A. Yes, sir.

Cross-examination.

By Mr. Lamfrom:

Q. What did you say your business was?

A. Tile layer. I am a mechanic.

Q. Are you a contractor?

A. No, sir, I am a mechanic.

Q. For whom do you work?

A. Butler & Sons.

Q. Butler & Son is a contractor who has a contract with the defendant union?

A. Yes, sir.

Q. That is, it is a closed shop?

A. Yes.

Q. Are you a member of the union committee that lays down the policy of the local unions?

[fol. 219] A. Well, I wouldn't say we lay down the policy of the local union. The union lays down its own policy.

ABRAHAM AUWENEEL, recalled.

Direct examination.

By Mr. Padway:

Q. This is the first labor trouble, taking labor in general, the relationship between labor and contractors, this is the first labor trouble you have had, the Senn difficulty?

A. Yes.

Q. Your union has been able to maintain a fair state of wages and standards, at least satisfactory to the unions, that has caused no greater difficulty than a three day walk-out in 1900?

[fol. 220] 2 P. M. Same appearances. Trial resumed.

Arguments to Court made by Mr. Engelhard in behalf of plaintiff.

Trial now adjourned to January 16, 1936.

January 16, 1936, 9:30 A. M. Same appearances. Trial resumed.

Arguments of counsel made to Court.

Luncheon recess had.

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2 P. M. Same appearances. Trial resumed.

STATEMENT

Mr. Padway: If the Court please, I wish to make a statement on the record as counsel for my clients that Exhibit 6, the letter of July 11th, 1935, was sent out to contractors and architects, not very many. I am informed the sum of about ten of them. It was not many. Which gave the list of fair contractors, by fair, I mean, from the union's point of view, or those who operated a union shop. Now, there is a statement in the letter that if the work is awarded, tile work is awarded to contractors, by contractors or architects, that this union would picket such contractors or architects. It adds this phrase "Or employ other lawful means to help us in our fight to better conditions in our trade." Now, the union and its officials, not being lawyers, did not secure [fol. 221] legal advice at that time. If they had, perhaps, they would have been advised that was lawfully legal, but since this letter was written and prior to it there has been no picketing of a contractor's premises and no picketing of an architect, and a decision was rendered by this court on the day that this trial commenced which would infer—which holds, and from which I would infer that the picketing of

an architect's or contractor's office, not the job where Mr. Senn may be working, because that would be picketing Mr. Senn, but as a contractor, to picket those premises may be and probably *is*, under the holding of this court, is illegal. That being so my clients advised of that holding and I state now to the court that I am interpreting that holding to prohibit them from either writing to contractors or to architects, or others, that they will picket them as contractors or as architects in connection with Senn's employment as a tile layer contractor as illegal and that they must not do that. I will state to this court that they won-t do that, unless the Supreme Court, if the Supreme Court is called upon to, hold otherwise. Of course, I am not saying I will not advise my clients, and if I am wrong the Court can take that into consideration—I will advise my clients that it is proper for them to write to architects and con-
[fol. 222] tractors that they are in dispute with Mr. Senn over the subject of unionizing and that they will ask him not to give him contracts. I make that statement so that you gentlemen and the Court knows it. I shall also advise them, unless the Court rules otherwise, that they may picket the premises of Mr. Senn and that if they know where he performs his job, that they may picket the job, with appropriate information to the public on the signs that it is he, Mr. Senn. What their controversy is and who it is and over what it is. I want that understood so that if it be beyond the confines of propriety, the Court may rule upon it. But we will not make any threats or statements to the contractors, or architects, or others, that any punishment will be inflicted upon them for giving work to Mr. Senn. All that will be done will be the pure solicitation of these persons not to give him work.

STATEMENT

Mr. Lamfrom: Without offense to counsel and for the record I object to the reception in the record of any statement on the part of counsel as to what he will advise, or what he advised his clients to do, or what he will promise will be done, as that is not competent or relevant matter in a suit of this kind, where the evidence has all been in and
[fol. 223] where it was perfectly proper and the opportunity

was open if counsel thought that sort of evidence would be of service to him to have introduced it.

The Court: Your statement may stand as part of the record.

Exception by plaintiff.

Arguments of counsel continued to Court.

Case now taken under advisement by Court.

[fol. 224] STATEMENT AS TO ARGUMENTS, ETC.

Upon the close of the testimony and in the arguments of plaintiff's counsel and before the decision of the court, the plaintiff argued, and the questions so argued were considered by the court prior to and in the making of the court's decision in the case, that the following statutes of the Wisconsin Statutes of 1935 were invalid and unconstitutional as applied to this case:

Section 103.56 of the Wisconsin Statutes of 1935 for the reason that the same is invalid and unconstitutional because it violates Sections 1 and 9 of Article I and Section 2 of Article VII of the Wisconsin Constitution and violates Section 1 of Article XIV of the Constitution of the United States, in that any construction of said statute by the court, as applied to this case, so as to deprive the plaintiff of the remedy sought would deprive the plaintiff of life, liberty or property without due process of law and deny to the plaintiff the equal protection of the laws;

Section 103.62 of the Wisconsin Statutes of 1935 for the reason that the same is invalid and unconstitutional because it violates Sections 1 and 9 of Article I and Section 2 of Article VII of the Wisconsin Constitution and violates Section 1 of Article XIV of the Constitution of the United States, in that any construction of said statute by the court, as applied to this case, so as to deprive the plaintiff of the remedy sought would deprive the plaintiff of life, liberty or property without due process of law and deny to the plaintiff the equal protection of the laws.

The court duly considered the arguments on the constitutionality of said statutes and decided that said statutes and each of them were in all respects constitutional and valid, both as to the Constitution of the State of Wisconsin and the Constitution of the United States.

[fol. 225] The plaintiff proposed that the court make the annexed proposed findings of fact and conclusions of law, constituting his decision in this case, and the court refused to make each and all of the said findings of fact and conclusions of law as proposed by the plaintiff and made the findings of fact and conclusions of law which are a part of the record in this case as constituting his decision in the case.

Upon the trial, Plaintiff's Exhibits 1, 2, 3, 4, 5, 6 and 7 and Defendants' Exhibits 1 and 2 were offered and introduced in evidence. Plaintiff's Exhibits 2, 3, 4, 5 and 6 were read into the record and Defendants' Exhibits 1 and 2 were read into the record. Defendants' Exhibit 3 was offered for identification only. All of the said exhibits are enclosed in an envelope attached to this bill of exceptions.

[fol. 226] [File endorsement omitted]

IN CIRCUIT COURT OF MILWAUKEE COUNTY

[Title omitted]

Proposed Findings of Fact and Conclusions of Law—
Filed March 16, 1936

The above entitled action having duly come on for trial, in the above court, in that branch thereof presided over by the Hon. Otto H. Briedenbach, Circuit Judge, issue having been joined on issues of fact for the court, the plaintiff appearing by Lamfrom Tighe Engelhard & Peck, his attorneys, and the defendants appearing by Joseph A. Padway, their attorney, and the evidence having been adduced, and the court having heard the arguments of counsel and having taken the case under advisement, and being well and sufficiently advised in the premises, I, the Judge who heard this case, do hereby make the following Findings of Fact and Conclusions of Law, constituting my decision in this case:

FINDINGS OF FACT

1. That at all times set forth in the complaint the plaintiff was and now is a resident of the City and County of Milwaukee, State of Wisconsin, and that his occupation is that of a tile setter and tile contractor under the firm name of Paul Senn & Co.

2. That the plaintiff has been for approximately four (4) years and at the time of the trial was conducting the business [fol. 227] of a tile contractor from his residence at 3162 North First Street in the City of Milwaukee, and that in connection with his business of tile contractor he had rented and rents a show room at 4738 West Lisbon Avenue, in the City of Milwaukee, wherein he has on display samples of tile. That the plaintiff customarily employs one tile layer and one helper, depending upon the amount of work he has orders for to do at a given time, and that in fulfilling his contracts for the setting of tile, he, himself, works with his tools and hands either as a tile layer or tile layer's helper, applying his skill, knowledge and energy in the same manner as though he were an employee working for someone else instead of being a self-employer.

3. That plaintiff has invested approximately Seven Hundred Dollars ($700.00) in tools, equipment and supplies and that he has an annual overhead expense for rent, telephone, heat, operation of a Ford truck and other incidents, of approximately Six Hundred Dollars ($600.00).

4. That during the year 1935, the plaintiff made a net profit of approximately One Thousand Five Hundred Dollars ($1,500.00) on contracts performed by him and his helpers; that his sole income for the support of himself and his wife and four children is the tile business, as described in these findings; that during the year 1935, the plaintiff worked as a tile setter and helper approximately seven hundred fifty (750) hours, in addition to the time and energy that he put into his business in obtaining contracts and engaging in such business activities as a contractor would engage in who was not a self-employer; that the net income of the plaintiff for the year 1935 of One Thousand Five Hundred Dollars ($1,500.00) reflects approximately Seven Hun- [fol. 228] dred Fifty Dollars ($750.00) which the plaintiff earned by laboring directly with his tools and his own hands in the performance of his contracts.

5. That the plaintiff, in the majority of cases, is a subcontractor to the principal contractor on a job and that as such subcontractor he and his help install the tile in bathrooms of homes or install tile in any buildings requiring that kind of installation.

6. That none of the employees of the plaintiff are members of either of the defendant unions; that no contractual relation of any kind exists between the plaintiff and the defendant unions; that the defendant unions have not been designated by any of plaintiff's employees as their agents for collective bargaining or for any other purpose.

7. That the defendant, Tile Layers Protective Union, Local No. 5, and the defendant, Tile Layers Helpers Union, Local No. 47, are voluntary, unincorporated associations of individuals known as labor unions; that the business of each of said defendant unions is that usually carried on by trade unions.

8. That the defendant, Charles Schreiber, is the business agent of said Tile Layers Protective Union, Local No. 5, and is by occupation a tile setter, and resides at 2904 North 47th Street, Milwaukee, Wisconsin.

9. That the defendant, Herbert Sebastian, is the business agent of said Tile Layers Helpers Union, Local No. 47, and is by occupation a tile layers- helper, and resides at 3800 North 7th Street, Milwaukee, Wisconsin.

10. That between March 14, 1935, and December 6, 1935, the business agent and other representatives of the defend- [fol. 229] ant Tile Layers Protective Union, Local No. 5, demanded of the plaintiff that he enter into a written contract with their union, said Local No. 5, by the terms of which the plaintiff was to employ only members of the union and under such terms and conditions as are commonly known as union wages, hours and working conditions; that in addition to the above terms, the said union, through its representatives, demanded of the plaintiff that he agree to an additional term in said proposed written contract requiring the plaintiff to refrain entirely from engaging in any work as a tile layer or helper in the performance of any of his contracts and that he under no circumstances work with his tools as a tile layer or act as a helper in the installation of any of the materials customarily set or laid by a tile layer and his helpers.

11. That the plaintiff was at all times since March 14, 1935, and at the time of the trial, ready, willing and able to agree to all the terms in said proposed written contract submitted by the defendant union, Local No. 5, to the plaintiff,

and was willing to sign the said contract, provided the provision- which required the plaintiff to desist from engaging personally as a tile setter or as helper were deleted from said contract; that the plaintiff repeatedly informed the representatives of said union, Local No. 5, that he could not and would not agree with the said union not to work at his trade with his tools and with his hands in the performance of contracts which he obtained either as principal contractor or as subcontractor; that the said defendant union, Local No. 5, through its agents, at all times insisted and demanded that the plaintiff sign the contract submitted containing therein the provision requiring the plaintiff to give up his [fol. 230] right to work with his own hands at his own trade.

12. That the provision which plaintiff refused to agree to and which was the cause of his refusal to enter into said contract with the said defendant union, Local No. 5, is as follows:

"It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper, but that the installation of all materials claimed by the party of the second part listed under the caption "Classification of Tile Work" in this agreement shall be done by journeymen members of Tile Layers Protective Union Local No. 5."

13. That because of the refusal of the plaintiff to enter into said contract with the defendant union, Local No. 5, said refusal being based upon the reasons stated in these findings, and no other, the defendants entered into a conspiracy unlawfully and maliciously to molest, harrass and harm the plaintiff by diverse means so as to force him against his will to accede to the demand that he cease to engage in his trade of tile layer or helper or they would ruin him in his business and trade; that the acts of said conspiracy consisted of the following:

(a) The defendants caused the residence of the plaintiff to be picketed almost daily since December 6, 1935, the number of pickets varying from two to four, the pickets carrying banners upon which was printed in large letters the legend that plaintiff was unfair to organized labor;

(b) The defendants have caused the plaintiff to be pursued upon the streets of the City of Milwaukee by pickets

for the purpose of discovering where plaintiff and his helpers were at any particular time performing the work of installing tile;

[fol. 231] (c) The defendants have threatened to picket the premises of the owners and the offices of contractors and architects who let work to this plaintiff unless this plaintiff accedes to the demands of the defendants that the plaintiff sign the aforesaid contract agreeing thereby to perform no work with his tools and with his hands in the execution of his contracts.

14. That the defendants have threatened to continue such activities, except that at the trial of the case the defendants' counsel stated that the defendants would not picket the offices of contractors and architects who let work to the plaintiff and that in no event would the defendants further engage in any secondary boycott; that there was no sworn testimony on the part of the defendants, however, to this effect.

15. That other than the statement of the defendants' counsel set forth in the above finding, whatever its effect may be, the defendants threaten to continue to picket the home of the plaintiff and to picket the jobs which the plaintiff may have in the future, all for the purpose of continuing to exert pressure and force upon the plaintiff until such time as he will sign said contract with the provision in it requiring plaintiff not to work with his tools and with his own hands when performing his contracts.

16. That as a result of the defendants' conduct, through their agents, employees and members, in picketing the home of the plaintiff, causing it to be bannered with banners to the effect that he was unfair to organized labor when such was not the fact, in pursuing him upon the public high-
[fol. 232] ways, thereby putting him to the trouble of continuously dodging his pursuers in order to conceal from them where he and his helpers were performing their work so as to avoid picketing of the premises at which the plaintiff and his men were at work, the plaintiff has been harrassed, molested and interfered with, to his embarassment, humiliation and potential loss of business.

Conclusions of Law

And I find as Conclusions of Law:

1. That the defendants are wilfully, maliciously and unlawfully engaging, and have been engaging since December 6, 1935, in a concerted action to ruin the plaintiff in his reputation, trade and business, for the sole purpose of forcing the plaintiff, against his will, to agree with the defendants not to work with his tools and his hands in his trade, all in violation of Section 343.681 of the Wisconsin Statutes of 1933.

2. That this is not a case involving or growing out of a labor dispute as defined in Section 268.29 of the Wisconsin Statutes of 1933.

3. That the contract which the defendant union, Local No. 5, demanded that the plaintiff sign, in so far as it contains the provisions set forth in finding of fact No. 12, is illegal and contrary to the public policy of this state, and if the court were not to grant relief against the acts of the defendants against the plaintiff, as set forth in the findings, for the purposes therein set forth, it would be a violation of the Fourteenth Amendment to the Constitution of the United States, which guarantees to every person a fundamental right to work with his own hands at his trade with-
[fol. 233] out unlawful interference and hindrance.

4. That such unlawful demand on the part of the defendant union, Local No. 5, and the refusal of the plaintiff to accede to such unlawful demand, even when coupled with other demands which are legitimate demands of trade unions, to which legitimate demands the plaintiff is willing to accede, cannot constitute a labor dispute under Section 268.29 of the Wisconsin Statutes of 1933.

5. That defendants threaten to continue their illegal and unlawful acts unless restrained by the judgment of this court.

6. That plaintiff has no adequate remedy at law.

7. That the plaintiff is entitled to a judgment permanently enjoining the defendant unions, their members, servants, employees, sympathizers and associates, from picketing or patrolling, singly or in numbers, the home of the

plaintiff at No. 3162 North First Street, in the City of Milwaukee, State of Wisconsin, or wherever the plaintiff may reside hereafter; from picketing or patrolling, singly or in numbers, any premises of the owners where the plaintiff has performed, is performing or will perform any contract for tile setting or other work and labor, either as principal contractor or as subcontractor; from picketing or patrolling the offices of contractors or architects with whom the plaintiff may have or may have had any business dealings; from stating or proclaiming that the plaintiff is unfair to organized labor by reason of any past transaction had between the plaintiff and either of the defendant unions; from in any manner coercing or attempting to coerce the plaintiff not to work with his tools, or with his [fol. 234] hands in the performance of his contracts for the laying of tile; from in any wise attempting to molest, intimidate or coerce the plaintiff or any of the contractors, architects, owners of property or other persons seeking to transact business with the plaintiff; from doing or performing any act whatever which directly or indirectly interferes with the conduct of the plaintiff's business, trade or other pursuits.

Let judgment be entered accordingly.

Dated this — day of ——, 1936.
By the Court.

——, Circuit Judge.

[fols. 235-235a] PLAINTIFF'S EXHIBIT 1

Agreement

This Agreement entered into by and between —— ——, party of the first part and the Tile Layers Protective Union Local No. 5 party of the second part.

Article I

That in consideration of this agreement made this first day of April 1935, which is to remain in full force until April first 1936, unless sooner abrogated by mutual consent of the parties thereto, we do each for ourselves and every individual member of our respective organization pledge our full compliance with all its terms.

Article II

The party of the first part agree to employ members of the party of the second part when ever available and the party of the second part agree to furnish the party of the first part at all times sufficient workmen as may be needed to the full extent of their membership. In the event the party of the second part is unable to furnish workmen, then the party of the first part shall have the right to employ any one until such time as men can be replaced with members of Local #5.

Article III

It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper but that the installation of all materials claimed by the party of the second part as listed under the caption "Classification of Work" in this agreement, shall be done by journeymen members of Tile Layers Protective Union Local #5.

Article IV

It is fu-ther agreed that the carrying out of any of the provisions contained in the Constitution of the B. M. & P. I. U. of A. will in no way be considered a violation of any part of this agreement.

Article V

The party if the first part agree to pay a minimum wage rate of One Dollar and Twenty-five cents ($1.25) per hour, four days per week i. e., Tuesday, Wednesday, Thursday and Friday and working hours to be between the hours of 8 o'clock A. M. and 5 o'clock P. M. of any working day. Noon hour may be curtailed by members on the job, but not to be less than thirty minutes.

Article VI

All overtime shall be paid at a time and one-half rate, overtime means all time between the hours of 5 o'clock P. M. and 8 o'clock A. M. except where three shifts are employed. Work done on Saturday, Sunday and such legal holidays as recognized by this Union namely New Years

Day, Decoration Day, Fourth of July, Thanksgiving Day and Christmas Day shall be paid at a double rate.
[fols. 235-b–235-c] When holidays fall on Sunday the following day shall be recognized as such. No work to be done on Labor Day.

Article VII

All members of the party of the second part must be paid weekly either by check through the mail, or on the job on or before 4:30 o'clock P. M., and payday shall be Friday of each week.

Article VIII

The party of the first part agree to pay all transportation fare and room, board and other expenses actually incurred when working out of the city.

Classification of Work

The laying and setting of all floors, walls, ceilings, walk promenade, roofs, stair treads, hearths, fireplaces and decorative inserts, together with all marble plinths, thresholds or window stools used in connection with any tile work, also to prepare and set all concrete, brickwork or other foundation or material that may be required to set properly and complete such work; the setting and bedding of all tiling, stone, marble composition, glass mosaic or other materials forming the facing, hearth or fireplace of a mantel or the mantel complete, together with the setting of all cement, brickwork or other material required in connection with the above work; also the slabbing and fabrication of tile mantels, counters and tile panels of every description and the erection and installation of same. The building forming, shaping, construction or repairing of all fireplace work, wheather in connection with a mantel hearth or not and the setting and preparing of all material such as cement, plastermortar, brickwork, iron work or other materials necessary for the proper and safe construction and completion of such work, except that a mantel made exclusively of brick shall be conceeded to be Bricklayers work. It will be understood that the Tile refers to all burned-clay products as used in the tile industry, either glazed or unglazed and to all composition materials made in single units up to 15" x 20" x 2" except

quarry tile larger than 9″ x 9″ x 1¼″, also to mixtures of tile form in cement that are made for and intended for use as a finished floor surface, wheather upon exterior or interior floors, stair treads, promenades, roofs, garden walks, interior walls, ceilings, swimming pools and all places where tile may be used to form a finished or decorative purpose for practical use, sanitary finish and setting all accessories when built in walls or decorative inserts in other materials. The foreman over any tile work shall be a Tile Layer and at no time shall any one than a Tile Layer act as foreman on tile work. On any job where three or more Tile Layers are employed, the foreman shall receive One Dollar Thirty-seven and One Half Cents per hour.

Article IX

The party of the first part agree to pay all expenses exceeding two regular carfares of the Milwaukee area in any one work day.

_____ _____

_____ _____

_____

[fol. 236] In Supreme Court of Wisconsin

[Title omitted]

Minute Entry—June 4, 1936

And now at this day came the parties herein, by their attorneys, and this cause having been argued by Leon B. Lamfrom, Esq., for the said appellant, and by Joseph A. Padway, Esq., for the said respondents, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

[fols. 237-238] IN SUPREME COURT OF WISCONSIN

Milwaukee Circuit Court

PAUL SENN, Appellant,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5, Charles Schreiber, Tile Layers Helpers Union, Local No. 47, and Herbert Sebastian, Respondents

Opinion by Justice Fairchild

JUDGMENT—June 29, 1936

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Milwaukee County, in this cause, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of Two Hundred Forty-three and 65/100 ($243.65) Dollars.

Justices Fowler and Nelson dissent.

[fol. 239] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

PAUL SENN, Appellant,

v.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5, et al., Respondents

OPINION—Filed June 29, 1936

Appeal from a judgment of the circuit court for Milwaukee county: Otto H. Breidenbach, Circuit Judge. Affirmed.

Suit in equity begun on the 27th day of December, 1935, seeking to enjoin two labor unions and certain individuals who were officers of the unions from coercing the plaintiff

to refrain from engaging himself in the actual work of a tile layer or helper, the plaintiff being a contractor, and for other supporting relief. Judgment was entered in favor of defendants April 3, 1936, denying the injunction prayed for in the complaint.

The action is for a permanent injunction restraining defendants from interfering with or coercing the plaintiff in his business as a tile contractor. In such business he works with his own hands with tools of the trade, and employs one or two helpers not members of either of the defendant unions. He has no contractual relations with the defendants. The important facts appear in the findings by the trial court. The case was tried to the court and its findings include the following facts: The residence of the plaintiff and of the individual defendants. The organization of the unions with their business address, and the rela- [fol. 240] tion of the individual defendants to the unions; that the plaintiff for approximately four years conducted the business of a tile contractor in the city of Milwaukee; that he has now a show room in which he displays samples of tile; that he has, at times, employed one or two tile layers and helpers, depending upon the amount of work he has contracted to do at a given time; that he takes subcontracts for the installment of tile; that none of his employees were at any time members of either union; that the defendants desired the plaintiff to unionize his business and required of him the signing of a contract containing the following provision, referred to as Article 3:

"It is definitely understood that no individual member of a partnership or corporation engaged in the tile contracting business shall work with the tools or act as helper, but that the installation of all materials claimed by the party of the second part listed under the caption 'Classification of Tile Work' in this agreement shall be done by journeymen members of Tile Layers Protective Union Local No. 5."

that the plaintiff was willing to agree to the terms exacted by the unions with the exception of the conditions imposed by Article 3; that because of the refusal of the plaintiff, defendants caused the premises of the plaintiff to be picketed, the pickets carrying banners with the inscription "Unfair To Organized Labor;" that they caused the plaintiff to be followed from his place of business to the jobs so

that the jobs might be picketed; that the defendants sent letters to architects and contractors requesting them not to patronize the plaintiff and stating that if they did so, they would be picketed; that certain contractors in the city of Milwaukee entered into an agreement governing wages, hours and working conditions with the defendant unions, and are classed as union contractors; that by virtue of the agreement with union contractors, the defendant unions secure for their members advantages in their wages, hours and working conditions; that such wages are higher than the wages paid by the plaintiff; that the tile industry is [fol. 241] demoralized, and that the members of the defendant unions have been in competition with non-union tile setters and helpers in their effort to secure work; that for the purpose of enhancing the interest of their members, the unions have deemed it wise, in the protection of their rights in the prosecution of their trade, to require all employers agreeing to conduct a union shop to comply with "Article 3;" that plaintiff, by virtue of his status as an employer and contractor, is not entitled to membership in the defendant unions; that the requirements of the unions that a tile setter shall be a journeyman tile setter, who shall have acquired his practical experience by virtue of an apprenticeship consisting of service as an apprentice for not less than three years precluded the plaintiff from membership in the unions; that the picketing has been peaceful and without any unlawful acts; that the defendants agreed in open court to refrain from following the plaintiff from his place of business to his jobs, and to refrain from sending any further letters to architects or contractors, and to refrain from indulging in any acts or conduct mentioned in those letters. The court then concluded as matters of law; first, that a labor dispute exists between the plaintiff and the defendants; second, that it is not unlawful for the defendants "to advise, notify or persuade, without fraud, violence or threat thereof, any person or persons, of the existence of said labor dispute; that it is not unlawful for the defendants to give publicity to, and obtain or communicate information regarding the existence of the facts involved in such dispute whether by advertising, speaking, or patrolling any public street or any place where any person or persons may lawfully be, providing said acts are done without intimidation or coercion and without fraud, violence, breach of the peace, or threat thereof." The third conclusion was to the effect

that the defendants have not indulged in violence or fraud. [fol. 242] The fourth, fifth and sixth conclusions are as follows:

"That the agreement submitted by the defendants to the plaintiff, setting forth terms and conditions prevailing in that portion of the industry which is unionized, is sought by the defendants for the purpose of promoting their welfare and enhancing their own interests in their trade and craft as workers in the industry.

"That Article III of said agreement is a reasonable and lawful rule adopted by the defendants out of the necessities of the employment within the industry and for the protection of themselves as workers and craftsmen in the industry.

"That the plaintiff is not entitled to the relief prayed for in his complaint."

[fol. 243] FAIRCHILD, J.:

Appellant is engaged as a contractor in the tile setting business in Milwaukee. He conducts his business as a small concern, and in addition to hiring tile setters, he, himself performs services usually rendered by a journeyman or helper. It was established on the trial that appellant employed his brother approximately ten per cent of the time; that he entered into a partnership with William Neider, a former union journeyman who gave up his membership in the union to enter into the partnership, and also employed Arnold Holly, a suspended union member. From May, 1934, to May, 1935, out of a total of 1777 hours on jobs, appellant himself worked as tile setter 771 hours.

There were occasional conferences between appellant and the union officials before this contest developed. In March, 1935, a contract was submitted to appellant by the unions, Article III of which requires him to refrain from performing the work which it is his custom to perform, and to agree that such work be done by journeymen members of the Tile Layers Protective Union, Local No. 5. The ultimate object of the negotiations on the part of the respondents was to secure the unionization of appellant's business. The appellant asserts that he is willing to comply with all requirements covered by the union contracts except those which require him to refrain individually from working as a tile setter or helper. The dispute arises over the respective contentions thus outlined. It will readily appear that there

are elements involved in this controversy not present in the case of American Furniture Co. v. I. B. of T. C. and H. of A., Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, decided herewith. The demand here by the unions is for the appellant to conform to a definite wage scale prevalent on union jobs, and to conform to a fixed number of hours approved by the union. They also insist that he conform to the rules of apprenticeship and [fol. 244] other working conditions prevalent in the industry where union rules prevail. The requirement that the employer personally refrain from working with the tools of the trade is important and vital to the craftsmen affiliated with defendant unions, because the practices sought to be prevented can so readily affect wages and hours of labor. It is pointed out by respondent that the membership in the union has decreased during the depression years, and that as a necessary requisite for a proper existence and livelihood, these craftsmen find it necessary to require employers to comply with the terms of Article III. Appellant's method of conducting his business brings into the situation a direct attack by him upon the means relied upon by the unions to protect their scale of wages, hours and working conditions against the cutting of prices and lengthening of hours of work.

The respondents insist upon their right to exert economic pressure against one who refuses to bring his shop up to union standards by refusing to agree to the union rules requiring the contractor to abstain from working with the tools of the trade, and on this, base their declaration that a labor dispute exists. There does not seem to be much occasion to question the existence of a dispute between the associations, which are committed to the protection of certain standards of wages and hours, with a contractor engaged in the same craft who proposes to work therein as a journeyman or a helper at a price and during hours that suit him individually and which are below the standard desired by the unions.

The respondents, by the use of the practice of picketing, seek to induce the appellant to abandon his methods and to conform to the union rules. The distinctions between one engaged in the tile setting business and one working as a journeyman or helper is apparent, and if the proposed contract is entered into by appellant, he will bind himself to respect the union classifications and distinctions. Ap-

[fol. 245] pellant has declined to sign the suggested contract unless there be eliminated therefrom the provisions which require him to desist from working with his tools and his helping generally in the work of installing material. Respondents insist that the particular rule to which appellant objects is one in the furtherance of the legitimate interests of the members of the unions. In view of our decision in the American Furniture Co. Case, supra, and the cases there analyzed in the opinion written by Mr. Justice Wickhem, it is apparent that, under the laws of Wisconsin, where the primary purpose of the acts complained of is to protect and improve the condition of those whom the unions represent, such action is justifiable, because it tends to promote the welfare of the members of the union engaged in the same craft. There is no effort to induce or compel the appellant to do any unlawful thing. If it be assumed that appellant cannot operate his business successfully upon the conditions insisted upon by the respondents, still no right of appellant now protected by law is invaded by respondents' efforts to bring appellant's business to union standard. American Furniture Co. v. I. B. of T. C. and H. of A., Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, supra, and cases there cited. No question exists as to appellant's right to conduct a non-union shop under any terms he chooses. An economic contest has developed. Each of the contestants is desirous of the advantage of doing the business in the community where he or they operate. He is not obliged to yield to the persuasion exercised upon him by respondents.

The legislature, in outlining the public policy of this state, has precluded him from an appeal to the courts for assistance until some unlawful act has become imminent, or something has occurred to start in motion the administration of equity rules, or the performance of the duties of policing. The respondents do not question that it is appel- [fol. 246] lant's right to run his own business and earn his living in any lawful manner which he chooses to adopt. What they are doing is asserting their rights under the acts of the legislature for the purpose of enhancing their opportunity to acquire work for themselves and those whom they represent. The nature of the controversy is one in which the court and law enforcing officers can have no interest other than to preserve the equality of each contender before the law, and to require that each refrain from

doing any unlawful act. Courts, though differing as to the allowable scope, pretty generally agree that picketing is a legitimate means of economic coercion, if it is confined to persuasion and is free of molestation or threat of physical injury or annoyance. Frankfurter & Green, The Labor Injunction, p. 31.

The respondents act of peaceful picketing is a lawful form of appeal to the public to turn its patronage from appellant to the concerns in which the welfare of the members of the unions is bound up. As stated by respondents' counsel in their brief, "the public is free to accept or reject the appeal and plaintiff is free to perform all work he can get in whatever manner he wishes to perform it." He may work long hours. He may bid for contracts at a low figure based on low wages for himself and on long hours. In the judgment of respondents, his conduct in this respect affects their opportunity of maintaining a standard of better wages, regulated hours and improved working conditions, and the collision of the two sets of rights, the one in appellant, the other in the respondents, creates a labor dispute within the definition of the code. Each appeals to public opinion. If the trade turns from one to the other as a result of this dispute, the injury is incidental, injuria absque damno.

It appears that when issue was first joined between the parties, considerable spirit was manifested on both sides and evidently acts occurred calculated to intimidate ap- [fol. 247] pellant and bring about a secondary boycott. The trial court said:

"That because of their statements made by their counsel in open court and in their presence, that they will not send any more letters to owners, contractors, or architects as hereinbefore referred to, and will not indulge in any of the acts or conduct referred to in said letters, the court concludes that no unlawful acts will be committed or will be executed or continued."

The discretion of the trial court in determining that there is no occasion for a restraining order in the particulars suggested is well within the scope of duties imposed on it. We are of the opinion that no occasion exists for overruling the lower court in this particular, and in other respects the judgment is approved.

By the Court.—Judgment affirmed.

[fol. 248] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

DISSENTING OPINION—Filed June 29, 1936

FOWLER, J. (Dissenting):

I dissent in this case for the reason that in my opinion the case is not within the labor code and for the further reason that if it is within the code the picketing involved should be enjoined because it is done to coerce the plaintiff into doing an unlawful act. My reasons for considering the case not within the code and for considering that picketing to coerce the doing of an illegal act will be enjoined, are given in my dissenting opinion in American Furniture Co. v. I. B. of T. C. and H. of A. Chauffeurs, et al., decided herewith. In this connection I will only give my reasons for considering unlawful the act the defendants are seeking to coerce the plaintiff to do.

The picketing involved is done by the defendants for the purpose of coercing the plaintiff into signing a contract that is unlawful because it is in restraint of trade. Every contract in restraint of trade is illegal under the public policy of the state, as declared by sec. 133.01 Stats. A contract that restricts a promisor in the exercise of a gain-[fol. 249] ful occupation is a contract in restraint of trade. Every such contract is invalid if the restraint is unreasonable. Every restraint in such a contract is unreasonable if it is greater than is necessary for the protection of the persons for whose benefit the restraint is imposed or if it imposes undue hardship on the person restricted. Milwaukee Linen & Supply Co. v. Ring, 210 Wis. 467, 470, 246 N. W. 567; Restatement of Law of Contracts, secs. 513, 514, 515. In my opinion the proposed contract violates both these conditions of invalidity. The plaintiff could not do business as a contractor under the proposed contract without foregoing his right to labor in connection with his business, and if he gave up his business as a contractor his opportunity to work at his trade as a layer of tile would be diminished or destroyed because of exclusion from membership in the defendant union because he has not served three years as an apprentice under a journeyman tile

layer. It is nonsense to claim that three years of such apprenticeship is necessary to enable a competent plasterer to lay tile. It is without dispute that the plaintiff was a competent plasterer before he took up the trade of laying tile and it is without dispute that he is now a competent tile layer. The unreasonableness of the requirement of apprenticeship ties up with the unreasonableness of the restriction of the plaintiff's right to follow his chosen occupation of a tile layer and as a contractor of tile jobs.

The requirement that the plaintiff sign the contract proposed is an unreasonable requirement, in my opinion, for the protection of the defendants against the competition of the plaintiff, and it certainly is unreasonable in imposing such a hardship upon him as it does impose. Such contracts as the instant one are invalid because they tend "to [fol. 250] deprive the public of the services of persons in those capacities in which they are most useful and also tend to expose the public to the evils of monopoly." Tecktonius v. Scott, 110 Wis. 441, 449, 86 N. W. 672.

While the above is sufficient in my opinion to require reversal of the judgment herein and the granting of an injunction, I wish to say further that in the instant case, however it may be in the American Furniture Co. Case, supra, the picketing involved in my opinion deprives the plaintiff of liberty and property without due process of law. The Vth Amendment to the Constitution of the United States declares that no person shall be so deprived. If no person shall be so deprived, then no person shall so deprive him. Injury to business is deprivation of property. Truax v. Corrigan, 257 U. S. 312. To deprive one of his right to labor is to deprive him of his liberty. Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. Ed. 832. Under the facts of the case the picketing involved injures the plaintiff's business, deprives him of opportunity to labor, and inflicts irreparable injury upon him for which he has no adequate remedy at law. Hence the picketing should be enjoined, unless the injury resulting to the plaintiff from it is effected through due process of law.

"The right to follow any of the common occupations of life is an inalienable right • • • It is a large ingredient in the civil liberty of the citizen. • • • The right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States."

Butchers' Union Co. v. Crescent City, 111 U. S. 746, 762, 764, 765. The liberty mentioned in the Vth as well as the XIVth amendment "means, not only the right of the citizen to be free from the mere physical restraint of his person, [fol. 251] as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." Allgeyer Case, supra. As quoted in Cameron v. International Alliance T. S. E., 118 N. J. Eq. 11, 176 Atl. 692:

"'There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more or less than the sacred right of labor'".

"The right of a workman to the 'free use of his hands' has been described as one 'of which the legislature cannot deprive him, one which the law of no trades union can take from him, and one which it is the bounden duty of the courts to protect.' 'A man may not barter away his life or his freedom or his substantial rights.' Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365."

These statements imply that the right to labor with one's own hands when one will and as he will, the right to follow a chosen occupation or business, the right to earn one's own living, and the right to contract are so sacred, so voluable, so important to the individual, that no one may be coerced into giving them up, and when as here the means of coercing their surrender results in irreparable injury to the individual, the coercion should upon established principles of equity be enjoined. We are not here concerned with licensing restrictions or the like imposed under the police power for the protection of the public. We need only consider the facts of the instant case to perceive the denial and deprivation of liberty of the plaintiff and I perceive no "due process" by which the result is produced. The plain- [fol. 252] tiff is a man of family with no means of support except his labor. He is making a living for himself and family by laboring as a tile layer and contracting for small

jobs of tile laying to provide opportunity for so laboring. He employs "helpers" on occasion, and occasionally employs "journeymen" tile layers to help him. He is willing to employ none but members of the defendant labor union to aid him. He is willing to join the defendant union if it will receive him. He will pay the union scale of wages and conform to union hours. The only provision of the proposed contract to which he will not accede is the one denying him the right to labor with his own hands and tools upon the jobs he contracts to perform. He has not sufficient capital to enable him to take any but small jobs. Such jobs as he can handle will yield no profit unless he works upon them himself. He cannot make a living at laying tile as a journeyman without membership in the defendant union, and that is denied him because he has not served three years as apprentice to a journeyman tile layer, and without such membership he cannot procure sufficient employment as a journeyman. To picket his jobs will injure his business as a contractor and reduce his earnings below sufficiency for support of himself and family. Destruction of plaintiff's business through picketing is the object of the defendants and is likely to be attained if the picketing be continued, with resulting liability imposed upon the public for the support of himself and family, with resulting loss to the public of the benefit of his services as a tile layer, denial to the public of the benefit of his competition and, as it is the expressed purpose of the defendants to apply the restriction that it would place upon the plaintiff to all journeymen [fol. 253] tile layers who shall aspire to become contractors, with resulting imposition upon the public of a monopoly of the tile laying business in the hands of members of the defendant union. Business in contracting for such work as tile laying ordinarily begins with small beginnings, and if successful gradually extends to more considerable proportions. The plaintiff's road to success in such business is blocked, and the entry into such business is blocked to every worker, by the requirement of the defendants to which plaintiff objects. The requirement that no contractor shall work with his own hands and his own tools upon a job would foreclose every worker, union as well as non-union, from entering the contracting business unless he has or is able to procure capital otherwise not necessary for entry into and prosecution of the business to success. I cannot believe that

such result is made lawful by the claim that it is nothing but economic pressure applied to the furtherance of the cause of workers as a whole or of that class of workers belonging to labor unions. The view here expressed of right to an injunction under the situation here involved has the support of the only courts that have ever passed on situations closely similar. Roraback v. Motion Picture Machine Operators' Union, 140 Minn. 481, 169 N. W. 529; Hughes, et al v. Kansas City Motion Pictures M. O. Local No. 170 et al, 282 Mo. 304, 221 S. W. 94; Parker Paint & Wall Paper Co. v. Local Union No. 813, et al; 105 S. W. (va.) 911; 16 A. L. R. 222. The practice upheld by the court is Un-American, oppressive and intolerable. It is contrary to the concept that I have always had of the fundamental and inalienable rights of the individual citizen secured to him [fol. 254] by the constitution of the United States. I cannot see that concept held for naught by this court without protest. And I will not yield that concept until it is declared erroneous by the final arbiter of that constitution. My concept of the inherent rights of man under the constitution may be merely an ideal that I may eventually have to give up, but I am still strong in my faith in it; and I will ever cherish it unless it shall be destroyed by the ultimate authority, the Supreme Court of the United States.

The defendants claim that absence of due process in their depriving the plaintiff of his property and his liberty is avoided by the provision of the code declaring peaceful picketing lawful and because, as they say, the plaintiff is free to work with his hands and tools upon his jobs if he wants to. As to the latter, the plaintiff is no more free so to work in the face of the threat of destruction of his business and deprivation of his means of livelihood by continued and incessant picketing than he would be in the face of a threat to "beat him up" every time he took a contract for tiling. In the latter case he could make his contract and take his beating, if he wanted to, but it is quite apparent that he would not want to, and would refrain from subjecting himself to the threatened beating. A labor union may not use its power to such ends and with such effect. As said in Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 55 L. Ed. 797, 34 L. R. A. (NS) 874:

"The law, therefore, recognizes the right of the workingmen to unite and to invite others to join their ranks, thereby

making available the strength, influence, and power that come from such association. By virtue of this right, powerful labor unions have been organized.

"But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used [fol. 255] against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventitive powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one."

As to the peaceful picketing declared lawful by the code, whether or not it may be declared lawful in furtherance of a strike of employees, it passes the bounds of reasonableness to say it may be used to coerce one into refraining from working with his hands and the tools of his trade or following his chosen calling or making contracts in the prosec*u*ion of his business. No court has ever yet squarely held that picketing, peaceful or otherwise, is lawful except in aid of a strike. The case of Exchange Bakery & Restaurant Co. v. Rifkin, 245 N. Y. 260, does hold, in effect, that peaceful picketing *is* aid of a strike is lawful. Other cases so hold or imply. In the Rifkin Case, supra, only three employees struck. The rest stuck to their jobs. It is stated in effect in the opinion in the American Furniture Co. Case, supra, that, if as held in the Rifkin Case peaceful picketing by a union may be enjoined when only three employees are striking, it may be where no employees are striking and where there is no strike at all. This does not follow. In American Steel Foundries v. Tri-City Trades Council, 257 U. S. 184, a labor union was prosecuting a strike. Only two employees were shown to have participated in picketing in aid of it. The judgment enjoined all picketing by any of the defendants but the injunction, while upheld as to the other defendants, was so modified as to these two as to permit them to use "persuasion" to induce employees to quit work. The Tri-City Case was under the Clayton Act, but it plainly declares that striking employees may have rights [fol. 256] that non-strikers do not have, and that an injunc-

tion may issue against the latter that will not issue against the former.

That peaceful picketing is not made lawful in every controversy growing out of a labor dispute by the declaration of the code may, I think, be clearly shown by a few hypothetical cases. Suppose there is a strike of W. P. A. workers and they come to the capitol city in a great horde. They demand of the State Administrator that he increase their wages. This he is powerless to do. They make like demand upon the Governor of the state and he also is powerless to meet their demand. They then post pickets to patrol the sidewalk in front of the State Administrator's house bearing placards denouncing the administrator as unfair to labor although "fairly stating" "the essential facts of the labor dispute" and not bearing any misstatement of fact, conformable in all respects to the placarding upheld by the judgment of the court herein. The annoyance is so offensive to the State Administrator and his family that he leaves his house with his family and lives in a hotel until the picketing subsides. Strikers post pickets to patrol the public halls of the capitol in front of the entrance to the Governor's offices bearing placards containing like denunciation of the Governor and like statements of the "essential facts of the dispute" without falsifying. Is this picketing lawful? Suppose the case of Mrs. Blank. She has a family of several small children. She requires help in the care of her children and the performance of her household duties. The family income cannot spare over $3.00 per week to devote to that purpose. A maid out of employment is willing and desires to render the required service for the proffered wage and accepts the employment. A labor union, the members or [fol. 257] officers of which consider that $3.00 per week is not a sufficient wage, maintain pickets on the sidewalk in front of her home bearing placards calling attention to the fact that Mrs. Blank pays her maid only $3.00 per week and stating that she is "unfair to labor." Must Mrs. Blank and her husband submit to the annoyance and nuisance of this "peaceful picketing" week in and week out because a statute declares that peaceful picketing in labor disputes is lawful? These cases are not stated as presenting exact parallels to the instant case. They are stated as illustrating that all picketing is not lawful, athough it falls within the

statutory declaration. Whether it is lawful or not depends upon the instant situation involved.

"the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the XIVth Amendment is intended to preserve."

Truax Case, supra.

The defendants claim and base their claim of the validity of the defendants' acts upon the proposition that their demand is as stated in their briefs "a reasonably just one." It is of course fundamental that statutory provisions restricting the liberty and property of the citizen must be reasonable or they violate due process. They must bear a relation to the health, safety, good order or welfare of the public. The statute declaring peaceful picketing lawful bears no relation to the public health. It bears no relation to the safety or good order of the public. So far as it has any effect on safety and good order the tendency is to disserve rather than serve them. And as I understand the welfare requirement, the welfare served must be that of the public, not that of a particular class of the public to the detriment of another class of the public. To rule that peaceful [fols. 258-259] picketing in every case is lawful, would serve the interest of organized labor to the detriment of unorganized labor and not induce to the welfare of the public as a whole. If this may be done a legislature could enact any statute whatsoever affecting the rights of the citizen under the claim that it serves the public welfare and it would be immune from attack as withholding due process. To justify statutes affecting one class of the society to the detriment of another class, if there can be any such justification, the advantage to the one class must at least so overbalance the disadvantages to the other that the welfare of the public as a whole is thereby advanced. The instant statute, if applied to the situation here involved, in my opinion does not meet these tests.

The acts of the defendants here involved being in my opinion unlawful I see no need to discuss the question of the validity or invalidity of the injunctional provisions of the labor code.

I am authorized to state that Mr. Justice Nelson concurs in this opinion.

[fol. 260] IN SUPREME COURT OF WISCONSIN

[Title omitted]

MOTION FOR REHEARING—Filed July 13, 1936

Now comes the plaintiff and appellant above named, by Lamfrom Tighe Engelhard & Peck, his attorneys, and moves the court for a re-hearing in the above entitled action for the reasons and on the grounds to be set forth in the printed argument hereafter to be filed by the plaintiff and appellant in support of said motion.

Dated this 10th day of July, 1936.

Lamfrom, Tighe, Engelhard & Peck, Attorneys for Plaintiff and Appellant.

[fol. 261] Copy received. Jul. 11, 1936. Jos. A. Padway, Attorney.

[File endorsement omitted.]

[fol. 262] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER RETAINING RECORD—July 13, 1936

The said appellant having moved for a rehearing in this cause, it is now here ordered that the record be retained in this Court until the final determination of said motion.

[fol. 263] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING MOTION FOR REHEARING—September 15, 1936

The court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in this cause, it is now here ordered that said motion be, and the same is hereby, denied with $25.00 costs.

[fol. 264] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN

[Title omitted]

OPINION—Filed September 15, 1936

FAIRCHILD, J. (on motion for rehearing):

Upon the motion for rehearing, the plaintiff contends that to enforce the decision of this court would deprive him of the right to make his own livelihood with his own hands and tools, and that even if a labor dispute, as defined by secs. 268.18 to 268.29, Stats. 1933, now secs. 103.51 to 103.63, Stats. 1935, exists, that sec. 103.56 and 103.62, Stats. 1935, are unconstitutional and invalid as violating both the Wisconsin and federal constitutions. These contentions were urged in the original brief of plaintiff, were fully considered by this court in the decision of this case, and held to be without merit. These claims were not more particularly treated in the opinion deciding this case, because, as disclosed in the opinion, the views of this court upon the constitutional questions raised were decided adverse-ly to the contentions of plaintiff in the case of American Furniture Co. v. I. B. of T. C. and H. of A. etc., decided at the same time.

By the Court—Motion for rehearing denied with $25 costs.

[fol. 265] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 266] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed January 16, 1937

Comes now the appellant and adopts its Assignment of Errors as its statement of the points to be relied upon, and represents that the record as filed is necessary for the consideration of the case.

Dated, January 8, 1937.

Leon B. Lamfrom, Attorney for Appellant.

Service admitted. Jos. A. Padway, Attorney for Appellees.

[fol. 267] [File endorsement omitted.]

Endorsed on cover: File No. 41,198. Wisconsin, Supreme Court. Term No. 658. Paul Senn, appellant, vs. Tile Layers Protective Union, Local No. 5, Charles Schreiber, et al. Filed January 16, 1937. Term No. 658, O. T., 1936.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 658

PAUL SENN,

Appellant,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5,
CHARLES SCHREIBER, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

STATEMENT AS TO JURISDICTION.

LEON B. LAMFROM,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 658

PAUL SENN,

Appellant,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5, CHARLES SCHREIBER, TILE LAYERS HELPERS UNION, LOCAL No. 47, AND HERBERT SEBASTIAN.

STATEMENT AS TO JURISDICTION.

This case is one in which the validity of the Statutes of the State of Wisconsin, to wit: Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935 formerly and at the time this case was tried in the trial court denominated Sections 268.18 to 268.30 of the Wisconsin Statutes of 1933, is drawn in question upon the grounds that the said statutes, as construed in the opinion and judgment of the Supreme Court of the State of Wisconsin, are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, for the reason that the judgment of the Supreme Court of the State of Wisconsin deprives the appellant of liberty or property without due process of law and denies to the appellant the equal protection of the laws.

The statutes above enumerated are popularly known as the Labor Code of the State of Wisconsin, which was passed by the Legislature of the State of Wisconsin in 1931.

At the time the Supreme Court of the State of Wisconsin handed down its opinion in this case, which is not yet officially reported but is reported in 268 N. W., at page 270, it also handed down its opinion on the constitutionality of said statutes in the case of *American Furniture Company* v. *I. B. of T. C. & H. of A., Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, et al.*, reported in 268 N. W. at page 250, in which opinion it held the said statutes constitutional at pages 260 to 262. The opinion in this case, the report of which shows the opinion in the *American Furniture Company* case, both opinions having been handed down on June 29, 1936, did not go into the validity of said statutes for the reason that they had been held constitutional in the opinion in the *American Furniture Company* case. In rendering its opinion in this case, the court divided, four judges concurring with Mr. Justice Fairchild, who wrote the majority opinion, and two judges dissenting, the dissenting opinion having been written by Mr. Justice Fowler. The minority opinion in this case by Mr. Justice Fowler, found in 268 N. W., at page 274, goes into the question of whether the failure of the court to grant a judicial remedy in this case was a violation of the Constitution of the United States and holds that it was.

On the petition of appellant for a rehearing, the court was asked, although it had held the statutes valid in the *American Furniture Company* case, to pass directly upon the validity of these statutes in this case, and in the opinion on the appellant's motion for rehearing, found reported in 268 N. W., at page 872, handed down September 15, 1936, the court stated through Mr. Justice Fairchild:

> "Upon the motion for rehearing, the plaintiff contends that to enforce the decision of this court would deprive him of the right to make his own livelihood with his own hands and tools, and that even if a labor dispute, as defined by sections 268.18 to 268.30, Stats.

1933, now sections 103.51 to 103.63, Stats. 1935, exists, that sections 103.56 and 103.62, Stats. 1935, are unconstitutional and invalid as violating both the Wisconsin and Federal Constitutions. These contentions were urged in the original brief of plaintiff, were fully considered by this court in the decision of this case, and held to be without merit. These claims were not more particularly treated in the opinion deciding this case, because, as disclosed in the opinion, the views of this court upon the constitutional questions raised were decided adversely to the contentions of plaintiff in the case of *American Furniture Co.* v. *I. B. of T. C. and H. of A. etc.*, 268 N. W. 250, decided at the same time.

"Motion for rehearing denied, with $25 costs."

The statutes enumerated are in summary as follows:

Section 103.51 is entitled "Public policy as to collective bargaining," and provides, in substance, that negotiation of terms and conditions of labor should result from voluntary agreement between employer and employes; that the individual workman have full freedom of association, self-organization, and the designation of representatives of his own choosing; that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 103.52 is entitled " 'Yellow-dog' contracts" and is, in substance, to the effect that such contracts are contrary to public policy.

Section 103.53 is entitled "Lawful conduct in labor disputes" and enumerates acts which, performed singly or in concert, shall be legal; among others, giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute; ceasing to patronize or to employ any person or persons. Said section further provides that the doing in concert of any or

all of the acts specified shall not constitute an unlawful combination or conspiracy; that peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal; and that no court, nor any judge or judges thereof, shall have jurisdiction to issue any restraining order or temporary or permanent injunction which prohibits any person or persons from doing, whether singly or in concert, any of the foregoing acts.

Section 103.54 is entitled "Responsibility for unlawful acts" and provides, in substance, that no officer or member of any association or organization shall be held responsible or liable for the unlawful acts of individual officers, members, or agents, except upon proof by a preponderance of the evidence of the doing of such acts or ratification of such acts after actual knowledge thereof.

Section 103.55 is entitled "Public policy as to labor litigation" and states that the public policy is not to have injunctions issued except upon notice and hearing and not upon affidavits, in that the issuance of injunctive relief is usually irreparable to the opposing party.

Section 103.56 is entitled "Injunctions: conditions of issuance; restraining orders" and provides that no court nor any judge or judges thereof shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in section 103.62, except after hearing the testimony of witnesses in open court and except after findings of all the following facts by the court or judge or judges thereof:

(a) That unlawful acts have been threatened or committed and will be executed or continued unless restrained;

(b) That substantial and irreparable injury to complainant's property will follow unless the relief requested is granted;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial thereof than will be inflicted upon defendants by the granting thereof;

(d) That the relief to be granted does not violate the provisions of section 103.53, which defines lawful conduct in labor disputes;

(e) That complainant has no adequate remedy at law; and

(f) That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection.

Said section also provides for notice of hearing and for the issuance of a temporary restraining order for five days under conditions set forth therein, and for adequate security.

Section 103.57 is entitled "Clean hands doctrine" and, in fact, provides that no relief shall be granted to any complainant who has failed to comply with any legal obligation which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available machinery of governmental mediation or voluntary arbitration.

Section 103.58 is entitled "Injunctions: contents" and provides for the procedure for filing of findings of fact prior to the issuance of a restraining order or injunction, and provides further that the restraining order or injunction shall include only a prohibition of such specific act or acts as may be expressly complained of and as are expressly included in the findings of fact, and shall be binding only upon the parties to the suit, their agents, servants, em-

ployees and attorneys, or those in active concert and participation with them.

Section 103.59 is entitled "Injunctions: appeals" and provides for the expedition of appeals in the appellate court.

Section 103.60 is entitled "Contempt cases" and provides for a speedy and public trial by jury, except in case of direct contempt committed in the presence of the court or so near thereto as to interfere directly with the administration of justice.

Section 103.61 is entitled "Punishment for contempt" and sets forth as punishment for contempt a fine not exceeding twenty-five dollars or imprisonment not exceeding ten days in the jail of the county, or both.

Section 103.62 is entitled "Definitions" and provides as follows:

> "When used in sections 103.51 to 103.63, and for the purposes of these sections:
>
> "(1) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in a single industry, trade, craft, or occupation; or who are employes of one employer; or who are members of the same or an affiliated organization of employers or employes; whether such dispute is (1) between one or more employers or associations of employers and one or more employes or associations of employes; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employes or associations of employes and one or more employes or associations of employes; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in subsection (3) of 'persons participating or interested' therein (as defined in subsection (2)).
>
> "(2) A person or association shall be held to be a person participating or interested in a labor dispute

if relief is sought against him or it and if he or it is engaged in the industry, trade, craft, or occupation in which such dispute occurs, or is a member, officer, or agent of any association of employers or employes engaged in such industry, trade, craft, or occupation.

"(3) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employe, regardless of whether or not the disputants stand in the proximate relation of employer and employe."

Section 103.63 is entitled "Severability of provisions" and is to the effect that if any provision of sections 103.51 to 103.63 or the applications thereof to any person or circumstance is held invalid, the remainder of said sections and the application of such provisions to other persons or circumstances shall not be affected thereby.

This case is also one in which, by the decision of the Supreme Court of the State of Wisconsin denying relief to the appellant from picketing and other methods of interference with appellant's business, appellant is deprived of liberty or property without due process of law and is denied the equal protection of the laws in that appellant has no judicial remedy to protect such constitutional rights.

The final decision of the Supreme Court of the State of Wisconsin, entered in the last resort in all causes in the State of Wisconsin in which this decision could be had, is in favor of the statutes quoted above, as so construed, and in favor of the denial to the appellant of a remedy to protect his constitutional rights of liberty and property under Section 1 of the Fourteenth Amendment to the Constitution of the United States and to enjoy the equal protection of the

laws under the same section, the effect of said decision being to deprive the appellant of liberty or property without due process of law and to deny to appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws.

Therefore, in accordance with the rules of the Supreme Court of the United States, the petitioner respectfully petitions this court that this case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to-wit; Section 237 of the Judicial Code, also known as U. S. C. A. Title 28, section 344a, a review could be had in the Supreme Court of the United States by Writ of Error as a matter of right, and that this is also a case in which the denial of a remedy by the Supreme Court of the State of Wisconsin under Section 1 of the Fourteenth Amendment to the Constitution of the United States is a judicial decision of the Supreme Court of the State of Wisconsin which operates to deprive the appellant of liberty or property without due process of law and denies to appellant the equal protection of the laws.

The said Supreme Court of the State of Wisconsin in the last resort rendered its decision herein on June 29, 1936, and an opinion rendered on September 15, 1936, by the Hon. Edward T. Fairchild, Associate Justice of said Supreme Court of the State of Wisconsin, denied a re-hearing.

Said opinion of the Supreme Court of the State of Wisconsin in the last resort in all causes in the State of Wisconsin has not yet been officially reported but is unofficially reported in Volume 268 of the Northwestern Reporter, at page 270, and the opinion denying the motion for re-hearing is reported in Volume 268 of the Northwestern Reporter, at page 872.

This is a case in which the appellant (plaintiff in the trial court, the Circuit Court of Milwaukee County, Wisconsin)

sought an injunction to enjoin the appellees (defendants in the trial court), two labor unions and individually named officers of such labor unions, from coercing the appellant to give up his right to work in his own business, that of a small tile layer-contractor, from attempting to molest, intimidate or coerce any of the contractors, architects, owners, or other persons seeking to transact business with the appellant, from representing or stating that the appellant is unfair to organized labor, and from interfering in any unlawful manner with the appellant and the family of the appellant at his residence or at any place where the appellant and his family may lawfully be.

Appellant at the time of the trial in the spring of 1936 was thirty-six years of age, married, had four children, resided in Milwaukee County, Wisconsin, and was engaged in a small tile contracting business. He is a man of considerable education and experience, having been engaged in electrical and civil engineering work and in the installing of equipment in steel mills and gas plants; also having worked as an industrial engineer. In 1930 he went to Florida because of the condition of the health of members of his family. He had to earn a living so he hired out as a day laborer and did tile work in Florida for nine or ten months. In 1932 he started in a very small way in the tile contracting business in Milwaukee. His usual crew in his operations was a man and his helper. Senn himself worked continuously in this business, setting tile. He just about made a living out of the business. For instance, in 1935 he made about fifteen hundred dollars, seven hundred fifty dollars of that being attributable directly to the fact that he labored in his business with his own hands and tools, setting tile. He has invested in his business seven hundred fifty to eight hundred dollars. He has no income except what he gains from his tile business.

In March, 1935, the appellee, Tile Layers Protective Union, Local No. 5, demanded that Senn sign a closed shop union contract, which contains Article III, reading as follows:

> "It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper, but that the installation of all materials claimed by the party of the second part listed under the caption "CLASSIFICATION OF TILE WORK" in this agreement shall be done by journeyman members of Tile Layers Protective Union Local No. 5."

Senn said that he could not sign the contract unless Article III were eliminated because that would operate to deprive him of his right to make his own living and actually make it impossible for him to continue in his tile contracting business. He was willing to sign the contract if Article III were eliminated. The union refused to eliminate said Article III and commenced picketing appellant's home, where he maintains his shop, in December, 1935, and has ever since continued to picket him and follow him around town in going to and from his jobs. The union also sent letters to architects and contractors in which they included a list of fair contractors and stated that if anyone outside of said list (in which category the appellant fell) was awarded tile work, they would picket such jobs, contractors' or architects' offices.

Appellant's claim was and is that he has a constitutional right to work with his own hands and tools in a lawful occupation, and that to deny him a remedy against the appellees, who were picketing and otherwise molesting and damaging him, would be in effect to deprive him of liberty or property without due process of law and deny him the equal protection of the laws.

The appellees sought to justify their conduct under the so-called Wisconsin Labor Code by maintaining that there existed between Senn, the appellant, and the appellees a labor dispute and that the sections of said so-called Wisconsin Labor Code, Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, at the time of the trial being Sections 268.18 to 268.30 of the Wisconsin Statutes of 1933, were in effect a constitutional legislative prohibition upon the court to grant Senn any relief; that the picketing and other activities were carried on for the benefit of the unions as they saw their benefits, and that the situation thus created in the so-called labor dispute left Senn in the position of one who is damaged but has no legal remedy.

The trial court in its decision followed this theory of the appellees, and, denying appellant the relief requested, held that Article III, which would require the appellant to cease working as a tile layer, was a lawful rule, its purpose being to ameliorate the condition of the members of the union.

The constitutional questions involved were raised, argued and considered by the trial court, but the trial court decided adversely to the appellant and held that the statutes involved were in all respects valid, both as to the Constitution of the State of Wisconsin and the Constitution of the United States. These constitutional questions were raised at the close of the testimony and on the oral arguments before the decision of the court, and the reasons were given for the contention that said statutes were invalid. The court duly considered these arguments and decided that the statutes and each of them were in all respects constitutional and valid.

The appellant, under the practice prevailing under the code of procedure in the State of Wisconsin, proposed that the court make findings of fact and conclusions of law in writing, in which the court would find as a conclusion of law

that if the court were not to grant the relief asked for by the appellant against the acts of the appellees, it would be a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which, under the conditions in this cause, guarantees to the appellant a fundamental right to work with his own hands and tools in a lawful business without the unlawful interference and hindrance by others.

From the judgment of the trial court denying the appellant the relief prayed for, the appellant appealed to the Supreme Court of the State of Wisconsin, where the judgment of the trial court was affirmed and thereafter a motion of appellant for rehearing denied.

The said Supreme Court of the State of Wisconsin was the last resort in the State of Wisconsin.

In its opinion and in its opinion on the motion for rehearing, the Supreme Court of the State of Wisconsin passed on the constitutional questions raised, which were set forth in the briefs of the appellant in that court and which were argued in the oral arguments before the said court.

The Wisconsin Labor Code, consisting of Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, is an act which affects employers and employees and their respective rights and the rights of labor unions throughout the State of Wisconsin in their employment relations and otherwise, and it substantially affects all the citizens of the State of Wisconsin in respect to their constitutional rights and remedies in such relationships.

The decision rendered by the Supreme Court of the State of Wisconsin was the final decision made by the highest Court of the State by which such decision could have been made.

Some of the cases which the appellant believes are in support of his position and which will influence the decision of this court are as follows:

New York ex rel Bryant v. *Zimmerman*, ~~268~~ 278 U. S. 63;
Truax v. *Corrigan*, 257 U. S. 312;
Coppage v. *Kansas*, 236 U. S. 1.

Opinions of the majority and minority and the opinion on the motion for rehearing of the Supreme Court of the State of Wisconsin are hereto appended, reference to which may be necessary to ascertain the grounds of the judgment appealed from. The opinion of the Supreme Court of the State of Wisconsin on appellant's motion for rehearing must be read in connection with the opinion of the court in the case of *American Furniture Company* v. *I. B. of T. C. & H. of A., etc.*, 268 N. W. 250, at pages 260 to 262, both this case and the *American Furniture Company* case having been decided on the same day and the consideration of the statutes being involved in the opinions in both cases.

The application for appeal to the Supreme Court of the United States is presented on this 7th day of December, 1936.

LEON B. LAMFROM,
Attorney for Appellant.

EXHIBIT "A".

IN SUPREME COURT, STATE OF WISCONSIN

JANUARY TERM, 1936

177

PAUL SENN, *Appellant*,

v.

TILE LAYERS PROTECTIVE UNION, LOCAL NO. 5, *et al.*, *Respondents*.

Appeal from a judgment of the circuit court for Milwaukee County: Otto H. Breidenbach, Circuit Judge. *Affirmed.*

Suit in equity begun on the 27th day of December, 1935, seeking to enjoin two labor unions and certain individuals who were officers of the unions from coercing the plaintiff to refrain from engaging himself in the actual work of a tile layer or helper, the plaintiff being a contractor, and for other supporting relief. Judgment was entered in favor of defendants April 3, 1936, denying the injunction prayed for in the complaint.

The action is for a permanent injunction restraining defendants from interfering with or coercing the plaintiff in his business as a tile contractor. In such business he works with his own hands with tools of the trade, and employs one or two helpers not members of either of the defendant unions. He has no contractual relations with the defendants. The important facts appear in the findings by the trial court. The case was tried to the court and its findings include the following facts: The residence of the plaintiff and of the individual defendants. The organization of the unions with their business address, and the relation of the individual defendants to the unions; that the plaintiff for approximately four years conducted the business of a tile contractor in the city of Milwaukee; that he has now a show room in which he displays samples of tile; that he has, at times, employed one or two tile layers and helpers, depending upon the amount of work he has contracted to do at a given time; that he takes subcontracts for the installment

of tile; that none of his employees were at any time members of either union; that the defendants desired the plaintiff to unionize his business and required of him the signing of a contract containing the following provisions, referred to as Article 3:

> "It is definitely understood that no individual member of a partnership or corporation engaged in the tile contracting business shall work with the tools or act as helper, but that the installation of all materials claimed by the party of the second part listed under the caption 'Classification of Tile Work' in this agreement shall be done by journeymen members of Tile Layers Protective Union Local No. 5."

that the plaintiff was willing to agree to the terms exacted by the unions with the exception of the conditions imposed by Article 3; that because of the refusal of the plaintiff, defendants caused the premises of the plaintiff to be picketed, the pickets carrying banners with the inscription "Unfair To Organized Labor;" that they caused the plaintiff to be followed from his place of business to the jobs so that the jobs might be picketed; that the defendants sent letters to architects and contractors requesting them not to patronize the plaintiff and stating that if they did so, they would be picketed; that certain contractors in the city of Milwaukee entered into an agreement governing wages, hours and working conditions with the defendant unions, and are classed as union contractors; that by virtue of the agreement with union contractors, the defendant unions secure for their members advantages in their wages, hours and working conditions; that such wages are higher than the wages paid by the plaintiff; that the tile industry is demoralized, and that the members of the defendant unions have been in competition with non-union tile setters and helpers in their effort to secure work; that for the purpose of enhancing the interest of their members, the unions have deemed it wise, in the protection of their rights in the prosecution of their trade, to require all employers agreeing to conduct a union shop to comply with "Article 3;" that plaintiff, by virtue of his status as an employer and contractor, is not entitled

to membership in the defendant unions; that the requirements of the unions that a tile setter shall be a journeyman tile setter, who shall have acquired his practical experience by virtue of an apprenticeship consisting of service as an apprentice for not less than three years precluded the plaintiff from membership in the unions; that the picketing has been peaceful and without any unlawful acts; that the defendants agreed in open court to refrain from following the plaintiff from his place of business to his jobs, and to refrain from sending any further letters to architects or contractors, and to refrain from indulging in any acts or conduct mentioned in those letters. The court then concluded as matters of law; first, that a labor dispute exists between the plaintiff and the defendants; second, that it is not unlawful for the defendants "to advise, notify or persuade, without fraud, violence or threat thereof, any person or persons, of the existence of said labor dispute; that it is not unlawful for the defendants to give publicity to, and obtain or communicate information regarding the existence of the facts involved in such dispute whether by advertising, speaking, or patrolling any public street or any place where any person or persons may lawfully be, providing said acts are done without intimidation or coercion and without fraud, violence, breach of the peace, or threat thereof." The third conclusion was to the effect that the defendants have not indulged in violence or fraud. The fourth, fifth and sixth conclusions are as follows:

> "That the agreement submitted by the defandants to the plaintiff, setting forth terms and conditions prevailing in that portion of the industry which is unionized, is sought by the defendants for the purpose of promoting their welfare and enhancing their own interests in their trade and craft as workers in the industry.
>
> "That Article III of said agreement is a reasonable and lawful rule adopted by the defendants out of the necessities of the employment within the industry and for the protection of themselves as workers and craftsmen in the industry.
>
> "That the plaintiff is not entitled to the relief prayed for in his complaint."

FAIRCHILD, *J.*

Appellant is engaged as a contractor in the tile setting business in Milwaukee. He conducts his business as a small concern, and in addition to hiring tile setters, he, himself performs services usually rendered by a journeyman or helper. It was established on the trial that appellant employed his brother approximately ten per cent of the time; that he entered into a partnership with William Neider, a former union journeyman who gave up his membership in the union to enter into the partnership, and also employed Arnold Holly, a suspended union member. From May, 1934, to May, 1935, out of a total of 1777 hours on jobs, appellant himself worked as tile setter 771 hours.

There were occasional conferences between appellant and the union officials before this contest developed. In March, 1935, a contract was submitted to appellant by the union, Article III of which requires him to refrain from performing the work which it is his custom to perform, and to agree that such work be done by journeymen members of the Tile Layers Protective Union, Local No. 5. The ultimate object of the negotiations on the part of the respondents was to secure the unionization of appellant's business. The appellant asserts that he is willing to comply with all requirements covered by the union contracts except those which require him to refrain individually from working as a tile setter or helper. The dispute arises over the respective contentions thus outlined. It will readily appear that there are elements involved in this controversy not present in the case of *American Furniture Co.* v. *I. B. of T. C. and H. of A. Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee*, decided herewith. The demand here by the unions is for the appellant to conform to a definite wage scale prevalent on union jobs, and to conform to a fixed number of hours approved by the union. They also insist that he conform to the rules of apprenticeship and other working conditions prevalent in the industry where union rules prevail. The requirement that the employer personally refrain from working with the tools of the trade is important and vital to the craftsmen affiliated with defendant

unions, because the practices sought to be prevented can so readily affect wages and hours of labor. It is pointed out by respondent that the membership in the union has decreased during the depression years, and that as a necessary requisite for a proper existence and livelihood, these craftsmen find it necessary to require employers to comply with the terms of Article III. Appellant's method of conducting his business brings into the situation a direct attack by him upon the means relied upon by the unions to protect their scale of wages, hours and working conditions against the cutting of prices and lengthening of hours of work.

The respondents insist upon their right to exert economic pressure against one who refuses to bring his shop up to union standards by refusing to agree to the union rules requiring the contractor to abstain from working with the tools of the trade, and on this, base their declaration that a labor dispute exists. There does not seem to be much occasion to question the existence of a dispute between the associations, which are committed to the protection of certain standards of wages and hours, with a contractor engaged in the same craft who proposes to work therein as a journeyman or a helper at a price and during hours that suit him individually and which are below the standard desired by the unions.

The respondents, by the use of the practice of picketing, seek to induce the appellant to abandon his methods and to conform to the union rules. The distinctions between one engaged in the tile setting business and one working as a journeyman or helper is apparent, and if the proposed contract is entered into by appellant, he will bind himhelf to respect the union classifications and distinctions. Appellant has declined to sign the suggested contract unless there be eliminated therefrom the provisions which require him to desist from working with his tools and his helping generally in the work of installing material. Respondents insist that the particular rule to which appellant objects is one in the furtherance of the legitimate interests of the members of the unions. In view of our decision in the *American Furniture Co. Case, supra,* and the cases there

analized in the opinion written by Mr. Justice Wickhem, it is apparent that, under the laws of Wisconsin, where the primary purpose of the acts complained of is to protect and improve the condition of those whom the unions represent, such action is justifiable, because it tends to promote the welfare of the members of the union engaged in the same craft. There is no effort to induce or compel the appellant to do any unlawful thing. If it be assumed that appellant cannot operate his business successfully upon the conditions insisted upon by the respondents, still no right of appellant now protected by law is invaded by respondents' efforts to bring appellant's business to union standard. *American Furniture Co.* v. *I. B. of T. C. and H. of A. Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, supra,* and cases there cited. No question exists as to appellant's right to conduct a non-union shop under any terms he chooses. An economic contest has developed. Each of the contestants is desirous of the advantage of doing the business in the community where he or they operate. He is not obliged to yield to the persuasion exercised upon him by respondents.

The legislature, in outlining the public policy of this state, has precluded him from an appeal to the courts for assistance until some unlawful act has become imminent, or something has occurred to start in motion the administration of equity rules, or the performance of the duties of policing. The respondents do not question that it is appellant's right to run his own business and earn his living in any lawful manner which he chooses to adopt. What they are doing is asserting their rights under the acts of the legislature for the purpose of enhancing their opportunity to acquire work for themselves and those whom they represent. The nature of the controversy is one in which the court and law enforcing officers can have no interest other than to preserve the equality of each contender before the law, and to require that each refrain from doing any unlawful act. Courts, though differing as to the allowable scope, pretty generally agree that picketing is a legitimate means of economic coercion, if it is confined to persuasion and is free of molestation or threat of physical injury or

annoyance. Frankfurter & Green, The Labor Injunction, p. 31.

The respondents act of peaceful picketing is a lawful form of appeal to the public to turn its patronage from appellant to the concerns in which the welfare of the members of the unions is bound up. As stated by respondents' counsel in their brief, "the public is free to accept or reject the appeal and plaintiff is free to perform all work he can get in whatever manner he wishes to perform it." He may work long hours. He may bid for contracts at a low figure based on low wages for himself and on long hours. In the judgment of respondents, his conduct in this respect affects their opportunity of maintaining a standard of better wages, regulated hours and improved working conditions, and the collision of the two sets of rights, the one in appellant, the other in the respondents, creates a labor dispute within the definition of the code. Each appeals to public opinion. If the trade turns from one to the other as a result of this dispute, the injury is incidental, *injura absque damno*.

It appears that when issue was first joined between the parties, considerable spirit was manifested on both sides and evidently acts occurred calculated to intimidate appellant and bring about a secondary boycott. The trial court said:

> "That because of their statements made by their counsel in open court and in their presence, that they will not send any more letters to owners, contractors, or architects as hereinbefore referred to, and will not indulge in any of the acts or conduct referred to in said letters, the court concludes that no unlawful acts will be committed or will be executed or continued."

The discretion of the trial court in determining that there is no occasion for a restraining order in the particulars suggested is well within the scope of duties imposed on it. We are of the opinion that no occasion exists for overruling the lower court in this particular, and in other respects the judgment is approved.

By the Court—Judgment affirmed.

EXHIBIT "B".

IN SUPREME COURT, STATE OF WISCONSIN.

JANUARY TERM, 1936.

No. 177.

PAUL SENN, *Appellant*,

v.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5 *et al.*, *Respondents.*

FOWLER, J. (dissenting):

I dissent in this case for the reason that in my opinion the case is not within the labor code and for the further reason that if it is within the code the picketing involved should be enjoined because it is done to coerce the plaintiff into doing an unlawful act. My reasons for considering the case not within the code and for considering that picketing to coerce the doing of an illegal act will be enjoined, are given in my dissenting opinion in *American Furniture Co.* v. *I. B. of T. C. and H. of A. Chauffeurs, et al.*, decided herewith. In this connection I will only give my reasons for considering unlawful the act the defendants are seeking to coerce the plaintiff to do.

The picketing involved is done by the defendants for the purpose of coercing the plaintiff into signing a contract that is unlawful because it is in restraint of trade. Every contract in restraint of trade is illegal under the public policy of the state, as declared by sec. 133.01 Stats. A contract that restricts a promisor in the exercise of a gainful occupation is a contract in restraint of trade. Every such contract is invalid if the restraint is unreasonable. Every restraint in such a contract is unreasonable if it is greater than is necessary for the protection of the persons for whose benefit the restraint is imposed or if it imposes undue hardship on the person restricted. *Milwaukee Linen & Supply Co.* v. *Ring*, 210 Wis. 467, 470, 246 N. W. 367; Re-

statement of Law of Contracts, secs. 513, 514, 515. In my opinion the proposed contract violates both these conditions of invalidity. The plaintiff could not do business as a contractor under the proposed contract without foregoing his right to labor in connection with his business, and if he gave up his business as a contractor his opportunity to work at his trade as a layer of tile would be diminished or destroyed because of exclusion from membership in the defendant union because he has not served three years as an apprentice under a journeyman tile layer. It is nonsense to claim that three years of such apprenticeship is necessary to enable a competent plasterer to lay tile. It is without dispute that the plaintiff was a competent plasterer before he took up the trade of laying tile and it is without dispute that he is now a competent tile layer. The unreasonableness of the requirement of apprenticeship ties up with the unreasonableness of the restriction of the plaintiff's right to follow his chosen occupation of a title layer and as a contractor of tile jobs.

The requirement that the plaintiff sign the contract proposed is an unreasonable requirement, in my opinion, for the protection of the defendants against the competition of the plaintiff, and it certainly is unreasonable in imposing such a hardship upon him as it does impose. Such contracts as the instant one are invalid because they tend "to deprive the public of the services of persons in those capacities in which they are most useful and also tend to expose the public to the evils of monopoly." *Tecktonius* v. *Scott*, 110 Wis. 441, 449, 86 N. W. 672.

While the above is sufficient in my opinion to require reversal of the judgment herein and the granting of an injunction, I wish to say further that in the instant case, however it may be in the *American Furniture Co.* case, *supra*, the picketing involved in my opinion deprives the plaintiff of liberty and property without due process of law. The Vth Amendment to the Constitution of the United States declares that no person shall be so deprived. If no person shall be so deprived, then no person shall so deprive him. Injury to business is deprivation of property. *Truax* v. *Corrigan*, 257 U. S. 312. To deprive one of his right to labor

is to deprive him of his liberty. *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, 41 L. Ed. 832. Under the facts of the case the picketing involved injures the plaintiff's business, deprives him of opportunity to labor, and inflicts irreparable injury upon him for which he has no adequate remedy at law. Hence the picketing should be enjoined, unless the injury resulting to the plaintiff from it is effected through due process of law.

> "The right to follow any of the common occupations of life is an inalienable right • • • It is a large ingredient in the civil liberty of the citizen. • • • The right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States."

Butchers' Union Co. v. *Crescent City*, 111 U. S. 746, 762, 764, 765. The liberty mentioned in the Vth as well as the XIVth Amendment "means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." *Allgeyer* case, *supra*. As quoted in *Cameron* v. *International Alliance T. S. E.*, 118 N. J. Eq. 11, 176 Atl. 692:

> " 'There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more or less than the sacred right of labor.' "

And in *Erdman* v. *Mitchell*, 207 Pa. 79, 56 Atl. 327, it is said:

> "The right of a workman to the 'free use of his hands' has been described as one 'of which the legislature cannot deprive him, one which the law of no trades union can take from him, and one which it is the

bounden duty of the courts to protect.' 'A man may not barter away his life or his freedom or his substantial rights.' *Home Ins. Co.* v. *Morse*, 20 Wall. 445, 22 L. Ed. 365."

These statements imply that the right to labor with one's own hands when one will and as he will, the right to follow a chosen occupation or business, the right to earn one's own living, and the right to contract are so sacred, so valuable, so important to the individual, that no one may be coerced into giving them up, and when as here the means of coercing their surrender results in irreparable injury to the individual, the coercion should upon established principles of equity be enjoined. We are not here concerned with licensing restrictions or the like imposed under the police power for the protection of the public. We need only consider the facts of the instant case to perceive the denial and deprivation of liberty of the plaintiff and I perceive no "due process" by which the result is produced. The plaintiff is a man of family with no means of support except his labor. He is making a living for himself and family by laboring as a tile layer and contracting for small jobs of tile laying to provide opportunity for so laboring. He employs "helpers" on occasion, and occasionally employs "journeymen" tile layers to help him. He is willing to employ none but members of the defendant labor union to aid him. He is willing to join the defendant union if it will receive him. He will pay the union scale of wages and conform to union hours. The only provision of the proposed contract to which he will not accede is the one denying him the right to labor with his own hands and tools upon the jobs he contracts to perform. He has not sufficient capital to enable him to take any but small jobs. Such jobs as he can handle will yield no profit unless he works upon them himself. He cannot make a living at laying tile as a journeyman without membership in the defendant union, and that is denied him because he has not served three years as apprentice to a journeyman tile layer, and without such membership he cannot procure sufficient employment as a journeyman. To picket his jobs will injure

his business as a contractor and reduce his earnings below sufficiency for support of himself and family. Destruction of plaintiff's business through picketing is the object of the defendants and is likely to be attained if the picketing be continued, with resulting liability imposed upon the public for the support of himself and family, with resulting loss to the public of the benefit of his services as a tile layer, denial to the public of the benefit of his competition and, as it is the expressed purpose of the defendants to apply the restriction that it would place upon the plaintiff to all journeymen tile layers who shall aspire to become contractors, with resulting imposition upon the public of a monopoly of the tile laying business in the hands of members of the defendant union. Business in contracting for such work as tile laying ordinarily begins with small beginnings, and if successful gradually extends to more considerable proportions. The plaintiff's road to success in such business is blocked, and the entry into such business is blocked to every worker, by the requirement of the defendants to which plaintiff objects. The requirement that no contractor shall work with his own hands and his own tools upon a job would foreclose every worker, union as well as non-union, from entering the contracting business unless he has or is able to procure capital otherwise not necessary for entry into and prosecution of the business to success. I cannot believe that such result is made lawful by the claim that it is nothing but economic pressure applied to the furtherance of the cause of workers as a whole or of that class of workers belonging to labor unions. The view here expressed of right to an injunction under the situation here involved has the support of the only courts that have ever passed on situations closely similar. *Roraback* v. *Motion Picture Machine Operators' Union*, 140 Minn. 481, 169 N. W. 529; *Hughes et al v. Kansas City Motion Pictures M. O. Local No. 170 et al.*, 282 Mo. 304, 221 S. W. 94; *Parker Paint & Wall Paper Co.* v. *Local Union No. 813, et al.*, 105 S. W. (Va.) 911; 16 A. L. R. 222. The practice upheld by the court is Un-American, oppressive and intolerable. It is contrary to the concept that I have always had of the fundamental and inalienable rights of

the individual citizen secured to him by the Constitution of the United States. I cannot see that concept held for naught by this court without protest. And I will not yield that concept until it is declared erroneous by the final arbiter of that constitution. My concept of the inherent rights of man under the constitution may be merely an ideal that I may eventually have to give up, but I am still strong in my faith in it; and I will ever cherish it unless it shall be destroyed by the ultimate authority, the Supreme Court of the United States.

The defendants claim that absence of due process in their depriving the plaintiff of his property and his liberty is avoided by the provision of the code declaring peaceful picketing lawful and because, as they say, the plaintiff is free to work with his hands and tools upon his job if he wants to. As to the latter, the plaintiff is no more free so to work in the face of the threat of destruction of his business and deprivation of his means of livelihood by continued and incessant picketing than he would be in the face of a threat to "beat him up" every time he took a contract for tiling. In the latter case he could make his contract and take his beating, if he wanted to, but it is quite apparent that he would not want to, and would refrain from subjecting himself to the threatened beating. A labor union may not use its power to such ends and with such effect. As said in *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418, 55 L. Ed. 797, 34 L. R. A. (NS) 874:

> "The law, therefore, recognizes the right of the workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virtue of this right, powerful labor unions have been organized.
>
> "But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights,

and appealing to the preventative powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one."

As to the peacefully picketing declared lawful by the code, whether or not it may be declared lawful in furtherance of a strike of employees, it passes the bounds of reasonableness to say it may be used to coerce one into refraining from working with his hands and the tools of his trade or following his chosen calling or making contracts in the prosecution of his business. No court has ever yet squarely held that picketing, peaceful or otherwise, is lawful except in aid of a strike. The case of *Exchange Bakery & Restaurant Co.* v. *Rifkin*, 245 N. Y. 260, does hold, in effect, that peaceful picketing is aid of a strike is lawful. Other cases so hold or imply. In the Rifkin Case, supra, only three employees struck. The rest stuck to their jobs. It is stated in effect in the opinion in the *American Furniture Co.* case, *supra*, that, if as held in the *Rifkin* case peaceful picketing by a union may be enjoined when only three employees are striking, it may be where no employees are striking and where there is no strike at all. This does not follow. In *American Steel Foundries* v. *Tri-City Trades Council*, 257 U. S. 184, a labor union was prosecuting a strike. Only two employees were shown to have participated in picketing in aid of it. The judgment enjoined all picketing by any of the defendants but the injunction, while upheld as to the other defendants, was so modified as to these two as to permit them to use "persuasion" to induce employees to quit work. The *Tri-City* case was under the Clayton Act, but it plainly declares that striking employees may have rights that non-strikers do not have, and that an injunction may issue against the latter that will not issue against the former.

That peaceful picketing is not made lawful in every controversy growing out of a labor dispute by the declaration of the code may, I think, be clearly shown by a few hypothetical cases. Suppose there is a strike of W.P.A. workers and they come to the capitol city in a great horde. They demand of the State Administrator that he increase

their wages. This he is powerless to do. They make like demand upon the Governor of the state and he also is powerless to meet their demand. They then post pickets to patrol the sidewalk in front of the State Administrator's house bearing placards denouncing the administrator as unfair to labor although "fairly stating" "the essential facts of the labor dispute" and not bearing any misstatement of fact conformable in all respects to the placarding upheld by the judgment of the court herein. The annoyance is so offensive to the State Administrator and his family that he leaves his house with his family and lives in a hotel until the picketing subsides. Strikers post pickets to patrol the public halls of the capitol in front of the entrance to the Governor's offices bearing placards containing like denunciation of the Governor and like statements of the "essential facts of the dispute" without falsifying. Is this picketing lawful? Suppose the case of Mrs. Blank. She has a family of several small children. She requires help in the care of her children and the performance of her household duties. The family income cannot spare over $3.00 per week to devote to that purpose. A maid out of employment is willing and desires to render the required service for the proffered wage and accepts the employment. A labor union, the members or officers of which consider that $3.00 per week is not a sufficient wage, maintain pickets on the sidewalk in front of her home bearing placards calling attention to the fact that Mrs. Blank pays her maid only $3.00 per week and stating that she is "unfair to labor." Must Mrs. Blank and her husband submit to the annoyance and nuisance of this "peaceful picketing" week in and week out because a statute declares that peaceful picketing in labor disputes is lawful? These cases are not stated as presenting exact parallels to the instant case. They are stated as illustrating that all picketing is not lawful, although it falls within the statutory declaration. Whether it is lawful or not depends upon the instant situation involved.

> "The legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the XIVth Amendment is intended to preserve."
>
> *Truax* case, *supra*.

The defendants claim and base their claim of the validity of the defendant's acts upon the proposition that their demand is as stated in their briefs "a reasonably just one." It is of course fundamental that statutory provisions restricting the liberty and property of the citizen must be reasonable or they violate due process. They must bear a relation to the health, safety, good order or welfare of the public. The statute declaring peaceful picketing lawful bears no relation to the public health. It bears no relation to the safety or good order of the public. So far as it has any effect on safety and good order the tendency is to disserve rather than serve them. And as I understand the welfare requirement, the welfare served must be that of the public, not that of a particular class of the public to the detriment of another class of the public. To rule that peaceful picketing in every case is lawful, would serve the interest of organized labor to the detriment of unorganized labor and not induce to the welfare of the public as a whole. If this may be done a legislature could enact any statute whatsoever affecting the rights of the citizen under the claim that it serves the public welfare and it would be immune from attack as withholding due process. To justify statutes affecting one class of the society to the detriment of another class, if there can be any such justification, the advantage of the one class must at least so overbalance the disadvantages to the other that the welfare of the public as a whole is thereby advanced. The instant statute, if applied to the situation here involved, in my opinion does not meet these tests.

The acts of the defendants here involved being in my opinion unlawful I see no need to discuss the question of the validity or invalidity of the injunctional provisions of the labor code.

I am authorized to state that Mr. Justice Nelson concurs in this opinion.

EXHIBIT "C".

IN SUPREME COURT, STATE OF WISCONSIN

JANUARY CALENDAR 1936. AUGUST TERM, 1936.

No. 177.

PAUL SENN, *Appellant*,

v.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5, *et al.*, *Respondents.*

FAIRCHILD, *J.* (on motion for rehearing):

Upon the motion for rehearing, the plaintiff contends that to enforce the decision of this court would deprive him of the right to make his own livelihood with his own hands and tools, and that even if a labor dispute, as defined by secs. 268.18 to 268.29, Stats. 1933, now secs. 103.51 to 103.63, Stats. 1935, exists, that sec. 103.56 and 103.62, Stats. 1935, are unconstitutional and invalid as violating both the Wisconsin and federal constitutions. These contentions were urged in the original brief of plaintiff, were fully considered by this court in the decision of this case, and held to be without merit. These claims were not more particularly treated in the opinion deciding this case, because, as disclosed in the opinion, the views of this court upon the constitutional questions raised were decided adversely to the contentions of plaintiff in the case of *American Furniture Co.* v. *I. B. of T. C. and H. of A. etc.*, decided at the same time.

By the Court—Motion for rehearing denied with $25 costs.

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SUPREME COURT OF THE UNITED STATES

October Term, 1936.

No. 658

PAUL SENN, APPELLANT,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5, CHARLES SCHREIBER, ET AL.,

Appeal from the Supreme Court of the State of Wisconsin

BRIEF OF APPELLANT

LEON B. LAMFROM,

Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

October Term, 1936.

No. 658

PAUL SENN, APPELLANT,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5, CHARLES SCHREIBER, ET AL.,

Appeal from the Supreme Court of the State of Wisconsin

BRIEF OF APPELLANT

OPINION OF SUPREME COURT OF WISCONSIN:

SENN V. TILE LAYERS PROTECTIVE UNION, LOCAL NO. 5, et al., 268 N. W. 270, decided June 29, 1936, (not yet officially reported); petition for rehearing denied September 15, 1936, 268 N. W. 872, (not yet officially reported).

STATEMENT OF CASE

This is an appeal from a judgment of the Supreme Court of the State of Wisconsin handed down on June 29, 1936, affirming a judgment of the trial court, the Circuit Court of Milwaukee County, Wisconsin, in favor of the defendants (appellees), denying the plaintiff (appellant) a permanent injunction enjoining the defendants from picketing, banner-

ing as unfair, and boycotting the plaintiff for the purpose of forcing him to sign a contract with the defendant Tile Layers Union (R. 116-122, majority opinion; R. 123-130, minority opinion), the material clause of which contract is as follows:

> "ARTICLE III. It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper but that the installation of all materials claimed by the party of the second part as listed under the caption 'CLASSIFICATION OF WORK' in this agreement, shall be done by journeymen members of Tile Layers Protective Union Local No. 5." (R. 113)

None of the employees of the plaintiff were, at the time the demand was made by the defendant unions or at the time of the commencement of the action, members of either of the defendant unions; no contractual relations existed between the plaintiff and the defendant unions; and the defendant unions had not been designated by any of plaintiff's employees as their agent for collective bargaining or for any other purpose (R. 26, Finding of Fact No. 7).

Appellant has been for about five years a small tile contractor whose shop is at his home in the City of Milwaukee, where he lives with his wife and four children (R. 44-45). He maintains a show room at another place in said city where he has on display samples of tile (R. 45). He customarily employs one tile layer and one helper, depending upon the amount of work he has contracted to do (R. 50). He has always worked on his jobs with his tools and hands either as a tile layer or tile layer's helper (R. 47, 50), for which work he was fully experienced and capable (R. 50, 64-65, 81-82, 83, 99, 100). His business is a very small one. He has invested approximately $700 in his tools, equipment and supplies. During the year 1935, he made approx-

imately $1500 on the contracts which he performed together with his employees, about one-half of this income being attributable to his own labor (R. 51). His income from his tile laying business has been and is his sole source of income (R. 53).

Between March 14, 1935, and December 6, 1935, the Business Agent and other representatives of the defendant Tile Layers Union made demands upon the plaintiff that he enter into a contract with their union, by the terms of which contract, among other things, appellant would have to agree to Article III thereof hereinabove set forth (R. 55, 60, 79).

Appellant was agreeable to entering into said contract, provided only that Article III was changed so that he would not be deprived of the right to work in his own business, (R. 40, 58-59, 78). He was ready, willing and able to comply with every demand, excepting the demand that he give up his right to work with his tools and his hands in his own business (R. 58-59, 78).

Under the contract, as demanded by the defendant unions, appellant would have been deprived of the right to work with his own tools and hands in his own business, regardless of whether or not he was eligible to union membership. He, however, would also have been deprived of the right to work as an employee for any employer operating under a union shop contract with the defendant unions, inasmuch as he was not eligible to union membership. To be eligible, he would have had to serve as an apprentice as required by the Constitution of the Bricklayers, Masons and Plasterers International Union of America, which provides that all apprentices shall attend a technical night school for one year during their term of apprenticeship and that all regularly assigned apprentices shall be required to serve not less than three (3) years as such (R. 28, Finding of Fact No. 16; R. 66).

Thereafter, because of appellant's refusal to sign the contract as demanded by the unions, the appellees, their agents and servants, picketed the appellant's home, commencing December 6, 1935 (R. 62), followed the plaintiff as he went around the city to and from his jobs (R. 63), picketed the appellant's jobs (R. 92-93), bannered him with signs reading, "P. Senn Tile Company unfair" and "Have the union tile setter set your tile" (R. 64), and threatened to boycott the architects and contractors with whom appellant was doing business (R. 93-94), which last activity the appellees' counsel at the trial agreed to have discontinued (R. 103-104, 105). No assurance, other than this statement of counsel, was given that this boycott of contractors and architects would not be indulged in.

From the judgment of the Circuit Court of Milwaukee County an appeal was taken to the Supreme Court of the State of Wisconsin, which affirmed the judgment of the trial court by a divided court, five judges concurring in the majority opinion (R. 119-122) and two judges concurring in the dissenting opinion (R. 123-130).

The Supreme Court of Wisconsin held that the demand upon the appellant to desist from working with his own hands and tools in his business was a lawful and reasonable demand (R. 120-122) and that the activities of the defendants to force the plaintiff to accede to their demands were made lawful by *Sections 103.51 to 103.63* of the Wisconsin Statutes of 1935, known as the Wisconsin Labor Code (R. 121-122). *Sections 103.51 to 103.63* were at the time of the trial Sections *268.18 to 268.30* of the Wisconsin Statutes of 1933.

In affirming the decision of the trial court and denying appellant relief, the Supreme Court followed its decision in the case of *American Furniture Company v. I. B. of T. C.*

and H. of A., etc., 268 N. W. 250 (not yet officially reported), insofar as it upheld, as against the Fourteenth Amendment to the Constitution of the United States, the constitutional validity of the Wisconsin Labor Code. Said case was decided at the same time that the Supreme Court of Wisconsin decided the case at bar.

In the *American Furniture Company* case, the defendant union demanded of the employer that all of its employees become members of the union and that it sign a contract with the union. None of its employees were members of the demanding union or desired to become members but voted against becoming members of said union. The union commenced to picket the employer's place of business and banner it as being unfair to organized labor, and the Supreme Court of Wisconsin held that the so-called Wisconsin Labor Code made it lawful for the union, by such methods, to force the employer to coerce its employees to join such union. This decision was by a divided court, 4 to 3.

In the case at bar, upon appellant's motion for rehearing, the Supreme Court of Wisconsin handed down the following opinion:

> "Upon the motion for rehearing, the plaintiff contends that to enforce the decision of this court would deprive him of the right to make his own livelihood with his own hands and tools, and that even if a labor dispute, as defined by sections 268.18 to 268.30, Stats. 1933, now sections 103.51 to 103.63, Stats. 1935, exists, that sections 103.56 and 103.62, Stats. 1935, are unconstitutional and invalid as violating both the Wisconsin and Federal Constitutions. These contentions were urged in the original brief of plaintiff, were fully considered by this court in the decision of this case, and held to be without merit. These claims were not more particularly treated in the opinion deciding this case, because, as disclosed in the opinion, the views of this court upon the constitutional questions raised were decided adverse-

ly to the contentions of plaintiff in the case of American Furniture Co. v. I. B. of T. C. and H. of A. etc., 268 N. W. 250, decided at the time time." (R. 132)

ASSIGNMENT OF ERRORS

1. Said Supreme Court of the State of Wisconsin erred in rendering judgment affirming the judgment of the Circuit Court of Milwaukee County, Wisconsin, in holding the Wisconsin Statutes of 1935, Sections 103.51 to 103.63, as construed by said Circuit Court of Milwaukee County, Wisconsin, in this cause, to be a constitutional and valid act not in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that such construction deprived appellant of liberty or property without due process of law, and denied to appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws. (R. 2)

2. Said Supreme Court of the State of Wisconsin erred in failing to render judgment in favor of the appellant and thus reversing the judgment of the Circuit Court of Milwaukee County, Wisconsin, and in refusing, by failing to reverse said judgment of the Circuit Court of Milwaukee County, Wisconsin, to grant the relief prayed for by the appellant, for the reason that the refusal of the Supreme Court of the State of Wisconsin to so reverse said judgment of the Circuit Court of Milwaukee County, Wisconsin, was based upon a construction of said Wisconsin Statutes of 1935, sections 103.51 to 103.63, as applied to this cause, holding said statutes constitutional and valid, for the reason that such construction of said statutes is in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that such construction of said statutes deprived the appellant of liberty or property without due process of law and denied to appellant, a person within the

jurisdiction of the State of Wisconsin, the equal protection of the laws. (R. 2-3)

3. Said Supreme Court of the State of Wisconsin erred in granting judgment affirming the judgment of the Circuit Court of Milwaukee County, Wisconsin, because by the affirmance of said judgment of the Circuit Court of Milwaukee County, Wisconsin, the judgment of the Supreme Court of the State of Wisconsin operated as a judicial decision to deprive the appellant of liberty or property without due process of law and denied to the appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, for the reason that the judgment of the Supreme Court of the State of Wisconsin affirming the judgment of the Circuit Court of Milwaukee County operated as a denial to the appellant of a judicial remedy for the protection of appellant's rights of liberty and property and the equal protection of the laws under Section 1 of the Fourteenth Amendment to the Constitution of the United States in that said judgment of the Supreme Court of the State of Wisconsin deprived appellant of a judicial remedy for the protection of such rights and was, in effect, a taking of liberty or property from the appellant without due process of law and a denial to the appellant, a person within the jurisdiction of the State of Wisconsin, of the equal protection of the laws under said Section 1 of the Fourteenth Amendment to the Constitution of the United States. (R. 3)

4. Said Supreme Court of the State of Wisconsin erred in failing to render judgment reversing the judgment of the Circuit Court of Milwaukee County, Wisconsin, in that the refusal of the Supreme Court of the State of Wisconsin to so reverse the judgment of the Circuit Court of Milwaukee County, Wisconsin, and the refusal of the Supreme Court of

the State of Wisconsin to order, by such reversal, the said Circuit Court of Milwaukee County, Wisconsin, to grant appellant the relief prayed for was a judicial act depriving appellant of liberty or property without due process of law and denying to appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and such refusal of the Supreme Court of the State of Wisconsin to reverse said judgment of the Circuit Court of Milwaukee County, Wisconsin, in effect denied to the appellant a judicial remedy for the protection of his rights under said Section 1 of the Fourteenth Amendment to the Constitution of the United States. (R. 3-4)

5. Said Supreme Court of the State of Wisconsin erred in affirming the judgment of the Circuit Court of Milwaukee County, Wisconsin, and thus holding said Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, formerly Sections 268.18 to 268.30 of the Wisconsin Statutes of 1933, as construed by said Supreme Court of the State of Wisconsin in this cause, constitutional and valid in that they did not deprive the appellant of liberty or property without due process of law and did not deny the appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws. (R. 4)

6. Said Supreme Court of the State of Wisconsin erred in rendering judgment refusing to hold Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, formerly Sections 268.18 to 268.30 of the Wisconsin Statutes of 1933, invalid and in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, for the reason that the judicial construction of said sections, as construed by said Supreme Court of the State of Wisconsin, conferring a legal right upon the appellees to engage in the

conduct against the appellant complained of, operated to deprive appellant herein of liberty or property without due process of law and to deny to the appellant, a person within the jurisdiction of the State of Wisconsin, the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States. (R. 4)

7. Said Supreme Court of the State of Wisconsin erred in affirming the judgment of the Circuit Court of Milwaukee County Wisconsin, for the reason that the judgment of the Supreme Court of the State of Wisconsin operated as a judicial decision depriving the appellant of liberty or property without due process of law and denying to the appellant, a person within the jurisdiction of the State of Wisconsin; the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment to the Consitution of the United States. (R. 4-5)

STATUTES INVOLVED

The statutes which appellant contends are unconstitutional under Section 1 of the Fourteenth Amendment to the United States Constitution, as construed by the Supreme Court of the State of Wisconsin, are Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935. Said sections are known as the Wisconsin Labor Code, which became effective June 30, 1931. Said statutes will be found printed in full in the Appendix at pages 51 to 61.

SUMMARY OF ARGUMENT

POINT I—The Wisconsin Labor Code, Sections 103.51 to 103.63, Wisconsin Statutes of 1935, as Construed by the Supreme Court of the State of Wisconsin, deprives Appellant of Property Without Due Process of Law.

Appellant contends that the Wisconsin Labor Code, as construed by the Supreme Court of the State of Wisconsin, in so far as it denies relief against picketing and related activities against an employer by labor unions, whether or not they represent any of the employer's employees, *engaged in for the purpose of compelling an employer to give up his right to work in his own business*, contravenes the guaranty against deprivation of property without due process contained in Section 1 of the Fourteenth Amendment to the United States Constitution. Certainly, such activities, engaged in for *that purpose, when engaged in by labor unions representing none of the employer's employees*, cannot be rendered lawful by any statute without running afoul of said constitutional guaranty against the deprivation of property without due process.

The statute which declares such activities lawful under the circumstances revealed in the case at bar bears no relation to the public health. It bears no relation to the safety or good order of the public. So far as it has any effect on safety and good order, the tendency is to disserve rather than serve them. The welfare served by the Wisconsin Labor Code is not that of the public but that of a particular class of the public to the detriment of other classes of the public.

The Wisconsin Labor Code cannot be justified as a valid exercise of the police power under the well-known rules applicable thereto. The right of a citizen of the United States to work in a lawful business in a lawful manner and the right to follow any of the ordinary callings of life is an inalienable right which cannot be taken away without violating the Fourteenth Amendment. A state legislature cannot deprive citizens of the United States of such right, and, *a fortiori*, such right cannot be taken away by labor unions on the ground that that right is vested in them by a statute. *It is the bounden duty of courts to protect such right.* A man

may not barter away his life or freedom and cannot be forced by labor unions or anyone else to relinquish such right.

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254

Butchers' Union Slaughter-House and Live Stock Landing Company v. Crescent City Live Stock Landing and Slaughter-House Company, 111 U. S. 746, 28 L. Ed. 585

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. Ed. 260

Coppage v. Kansas, 236 U. S. 1, 59 L. Ed. 441

Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131

Adair v. United States, 208 U. S. 161, 52 L. Ed. 436

POINT II—The Wisconsin Labor Code, as Construed by the Supreme Court of Wisconsin, Denies Appellant the Equal Protection of the Laws.

Appellant was denied a remedy and was refused injunctive relief solely on the ground that the acts which he sought to have restrained were acts carried on in the course of a "labor dispute" within the meaning of the Wisconsin Labor Code. Appellant, under the Constitution of the State of Wisconsin and the statutes promulgated pursuant thereto, *but for the Wisconsin Labor Code as construed by the Supreme Court of the State of Wisconsin*, would have been accorded the relief that he sought. He is denied that relief against the appellees because of the fact that the appellees happen to be labor unions having in their membership employees of others in the same line of business and because he happens to be an employer.

Had the appellees not been labor unions representing workers in the industry and had the appellant not been an

employer, the activities of the appellees would have been restrained.

No dispute was here involved concerning wages, hours or working conditions of any of appellant's employees. The sole dispute was concerning the appellant's right to work in his own business with his own hands.

Appellant contends that the classifications established by the Wisconsin Labor Code, whereby relief is denied against labor unions which would be granted against others, and whereby relief is denied to an employer which would be granted to an individual employing no one, are wholly arbitrary, capricious and unreasonable and for that reason the Wisconsin Labor Code Violates Section 1 of the Fourteenth Amendment to the United States Constitution.

It is appellant's position that no classifications can reasonably be made and sustained which will give *any* group the right to picket, boycott and molest an individual *for the purpose of forcing him, against his will, to agree not to work with his own hands in his own business.* Any statute sanctioning such activity for such purpose by a group, neither employees nor ex-employees of the employer and not representing any of them, is clearly discriminatory and arbitrary and cannot be sustained under any theory as a proper exercise of the police power.

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254

In re Opinion of the Justices, 275 Mass. 580, 176 N. E. 649

In re Opinion of the Justices, 86 N. H. 597, 166 Atl. 640.

POINT III—Inasmuch as None of Senn's Employees Were Members of Appellee Unions and Said Unions Represented None of His Employees, the Statutes, Construed so as to Deny Senn the Right to Relief from Picketing and Related Activities by Said Unions, Deprived Him of Liberty and Property Without Due Process and Denied Him the Equal Protection of the Laws.

Appellant contends, first, that in so far as the Wisconsin Labor Code denies him a remedy against picketing and related activities engaged in for the sole purpose of forcing him, against his will, to give up his right to work in his own business with his own hands, it deprives appellant of property without due process and denies him the equal protection of the laws; and, second, that the Wisconsin Labor Code, in so far as it denies him relief against picketing *for any purpose* by a group, neither his employees nor ex-employees and not representing any of them, deprives him of property without due process and denies him the equal protection of the laws.

Under Point III of our argument, we maintain that even if the dispute between the appellant and appellee unions was concerning wages, hours and working conditions of appellant's employees, the statute, as construed by the Supreme Court of Wisconsin, nevertheless, violates the Fourteenth Amendment to the United States Constitution, *if it denies relief against such activities engaged in by a group neither employees nor ex-employees of an employer and not representing any of them.*

All that we have heretofore said under Points I and II is equally applicable to a consideration of this point. All that we have said concerning the unreasonableness and arbitrariness of a statute which attempts to legalize such activities and denies relief against the same applies here.

ARGUMENT

Point I.

Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, as Construed by the Supreme Court of the State of Wisconsin, Deprive Appellant of Property Without Due Process of Law.

Although none of Senn's employees were members of the appellee unions, and although neither of the appellee unions represented any of Senn's employees for collective bargaining, the said unions placed Senn in the position where he had to either give up his right to work in his own business by signing the contract (R. 112-115) containing Article III, or, if he refused to do so, give up his right to conduct his business free from molestation and interference.

The union took up with Senn the matter of the execution of said contract three or four times, and in the discussions of the union representatives with Senn, there was always one point upón which they could not get together and that point was Article III of the contract. Until Senn is willing to accept Article III of the contract, there will be no contract between Senn and the union (R. 33-34). Senn could not sign the agreement because he had to earn his living with his own hands (R. 40).

After picketing of Senn's home and his jobs commenced, the position of the union was, as is shown by the following testimony of Charles Schreiber, the Business Agent of the defendant, Tile Layers Protective Union, Local No. 5:

"Q. Now, what would you require of Mr. Senn to do today in order that you give up picketing his home and from picketing the jobs he works on?

"A. Sign this agreement.

"Q. If he did that you would pull off the pickets?

"A. Yes, and furnish him with union men.

• • •

"Q. Unless he agreed to quit work himself with his tools you wouldn't enter into a contract with him?

"A. Correct.

"Q. Until he does agree to lay down his tools and only employ union men to do the work he himself is now doing, until that time you intend to use what your attorney called economic pressure?

"A. Lawful picketing.

• • • •

"Q. Mr. Schreiber, if Mr. Paul Senn agrees to every article of your proposed contract, except article 3, you will still continue to picket?

"A. I don't understand the question.

"Q. If he agrees to every article of the ten articles except article 3?

"A. Yes, sir.

"Q. Will you still continue picketing?

"A. Yes."

(R. 43-44)

Senn made his position perfectly clear. At all times he was willing to sign the union agreement provided Article III would be changed so that he could work (R. 59).

This is conceded in the statement of defendants' counsel:

"Mr. Padway: He is willing to do everything we ask of him but the one thing, 'I won't abstain, or promise to abstain from working with the tools of the trade at tile setting'." (R. 67)

Senn never approached the defendant unions. The unions approached him. He never asked the unions for the right to enter into a contract with them (R. 33, 54-55). He, on the other hand, was willing to enter into a contract with the union if the union would not insist upon having the clause in it which would require him to give up the right to work in his own business (R. 40, 58-59).

It is undisputed that the purpose of the picketing was to make Senn operate a union shop, drop his tools and hire union labor to do the work for him, and that in order to consummate such objective of the unions, he would have to sign the contract, Plaintiff's Exhibit 1 (R. ~~23~~ 17, Finding of Fact No. ~~20~~ 18; R. 44).

The union agent Schreiber testified:

"Q. Mr. Schreiber, what is the present purposes of the union in picketing Mr. Senn at the present time?

"A. Our union, or rather the trade of the tile layers for the last two or three years has been so demoralized by the outside fellows cutting into our trade, which don't belong, and even those who do go out contracting, and our union is so developed we have to do something to try to eliminate that source of supply we will say.

"Q. Then the purpose of picketing Senn at the present time is to eliminate what you call a source of supply in the union situation?

"A. To sort of in a way, yes. To have him come into the union shop, drop his tools and hire union labor to do the work for him.

"Q. In order to consummate such a relationship, if you are successful in contravening this petition he would have to sign the contract you sent him?

"A. Yes.

"Q. Suppose Mr. Senn was willing to sign the contract as you sent him without the third clause?

"A. He cannot.

"Q. I know that. Let's get that clearly. It covers the laying down of his tools?

"A. They are not his tools. That is the argument.

"Q. I understand it there.

"A. Well, we don't. They are not his tools.

"Q. Let's not have a dispute. Wait until I finish with the question. I will rephrase it.

"A. That is better.

"Q. Assuming that Mr. Senn would be perfectly willing to sign this contract, which is in evidence here, which the union sent him without clause 3 included in it, would that be satisfactory to the union?

"A. No.

"Q. Then the only way that Senn can make peace with this union at the present time is by signing the contract, which you sent him, as it is written?

"A. As the other ten or eleven contractors in this town did. Yes, sir." (R. 83-84)

It is clear from this testimony that the immediate purpose of the union was as is indicated in the outset of this argument. As a result thereof, Senn was confronted with two alternatives, which, we contend, are in effect the same thing. One of the alternatives was, Sign this contract and get out of business to the extent that you cannot work in your own business, and the other alternative was, Persist

in working in your own business and you will have to get out of business. It seems to us that the very statement of this proposition proves the entire illegality of the position of the unions herein.

Senn's work in his own business consisted of setting tile, mixing mud, carrying mud—everything to make the tile work as easy as he could. He personally set as much tile as he could (R. 49).

The acts of the defendants, by which they sought to enforce their demands, were commenced on December 6, 1935, and consisted of picketing his home and picketing his jobs. When the picketing commenced on December 6, 1935, at his home, the Business Agent Schreiber was there with two pickets. He said, referring to the picketing, "Well, we are going to keep it up and we will picket the jobs." (R. 61-62). The pickets' cars followed him when he started out with his truck. They chased him at times for miles. Sometimes he had to go as much as two miles and sometimes he got rid of them in the first thirty seconds of the chase. Because he was followed, he did not use his truck very often. When he completed a job, he could not move all of his equipment in a car which he used so he had to move his equipment on a Sunday and he was chased for several miles with his truck (R. 63).

On July 11, 1935, the defendants sent to architects and contractors in Milwaukee a letter (Plaintiff's Exhibit 6) from the Tile Layers Protective Union, Local No. 5, in which was listed the names of the firms in harmony with them as union contractors, from which Senn's name was omitted. In this letter, they said to the architects and contractors, "If in two weeks time anyone outside this list is awarded tile work we will then picket such jobs, contractors' or architects' offices, or employ other lawful means

to help us in our fight to better the conditions of our trade." (R. 42-43).

It is true that the defendants' counsel at the close of the testimony in the trial court stated that his clients would not make any threats or statements to the contractors, or architects, or others, and that no punishment would be inflicted upon them for giving work to Senn (R. 103-104). He also stated that he would advise his clients, unless the court ruled otherwise, that they may picket the premises of Senn, and, if they knew where he performed his jobs, they may picket the jobs, with appropriate information to the public on the signs as to the nature of the controversy (R. 104). The court permitted these statements to stand as a part of the record despite the objections of counsel (R. 104-105) that they were not competent evidence.

The picketing of Senn was done with banners. One sign read, "P. Senn Tile Company is unfair to the Tile Layers Protective Union" and another sign read, "Let the Union tile layer install your tile work." (R. 41)

The defendants justified their demands and conduct, and the Supreme Court of Wisconsin upheld such justification, on the ground that a labor dispute existed between the appellant and the appellee unions, as defined in the Labor Code, now Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, and that their activities were sanctioned by said Statutes (R. 120-121, 132).

The trial court found that a labor dispute existed; that it was not unlawful for the defendants, in furtherance of the dispute, to do what they had done; that the agreement submitted by the defendants to the appellant is sought by the defendants for the purpose of promoting their welfare and enhancing their own interests in their trade and craft

as workers in the industry; that Article III of the agreement is a reasonable and lawful rule adopted by the defendants out of the necessities of the employment within the industry and for the protection of themselves as workers and craftsmen in the industry (R. 29).

The plaintiff requested of the trial court, among others, the following Conclusion of Law:

> "3. That the contract which the defendant union, Local No. 5, demanded that the plaintiff sign, in so far as it contains the provisions set forth in finding of fact No. 12 (referring to proposed finding of fact No. 12 of the plaintiff, which set forth Article III of the contract) is illegal and contrary to the public policy of this state, and if the court were not to grant relief against the acts of the defendants against the plaintiff, as set forth in the findings, for the purposes therein set forth, it would be a violation of the Fourteenth Amendment to the Constitution of the United States, which guarantees to every person a fundamental right to work with his own hands at his trade without unlawful interference and hinderance." (R. 111)

Upon the close of the testimony, and in the arguments, appellant's counsel had also challenged the validity of said sections of the Wisconsin Statutes as against Section 1 of the Fourteenth Amendment to the Federal Constitution on the ground that if such sections were so construed by the court as to deprive the plaintiff of his right to relief by injunction, appellant would be deprived of life, liberty or property without due process of law and would be denied the equal protection of the laws. The court duly considered the arguments on the constitutionality of the statutes and decided that said statutes denied appellant any relief and that they, and each of them, were constitutional and valid under the Constitution of the United States and the Constitution of the State of Wisconsin (R. 105).

The majority opinion of the Supreme Court of the State of Wisconsin upheld this construction of the said statutes by the trial court and their validity. Referring to this opinion of the majority, the *minority opinion* states:

> "The practice upheld by the court is Un-American, oppressive and intolerable. It is contrary to the concept that I have always had of the fundamental and inalienable rights of the individual citizen secured to him by the Constitution of the United States. I cannot see that concept held for naught by this court without protest. And I will not yield that concept until it is declared erroneous by the final arbiter of that Constitution. *My concept of the inherent rights of man under the Constitution may be merely an ideal that I may eventually have to give up, but I am still strong in my faith in it; and I will ever cherish it unless it shall be destroyed by the ultimate authority, the Supreme Court of the United States.* (italics ours)
>
> "The defendants claim that absence of due process in their depriving the plaintiff of his property and his liberty is avoided by the provision of the code declaring peaceful picketing lawful and because, as they say, the plaintiff is free to work with his hands and tools upon his jobs if he wants to. As to the latter, the plaintiff is no more free so to work in the face of the threat of destruction of his business and deprivation of his means of livelihood by continued and incessant picketing than he would be in the face of a threat to 'beat him up' every time he took a contract for tiling." (R. 127)

Further, the dissenting opinion states:

> "The statute declaring peaceful picketing lawful bears no relation to the public health. It bears no relation to the safety or good order of the public. So far as it has any effect on safety and good order the tendency is to disserve rather than serve them. And as I understand the welfare requirement, the welfare served must be that of the public, not that of a particular class of the public to the detriment of another class of the public. To rule that peaceful picketing in every case is lawful would serve the interest of organized labor

to the detriment of unorganized labor and not induce to the welfare of the public as a whole. If this may be done, a Legislature could enact any statute whatsoever affecting the rights of the citizen under the claim that it serves the public welfare and it would be immune from attack as withholding due process. To justify statutes affecting one class of the society to the detriment of another class, if there can be any such justification, the advantage to the one class must at least so overbalance the disadvantages to the other that the welfare of the public as a whole is thereby advanced. The instant statute, if applied to the situation here involved, in my opinion does not meet these tests." (R. 130)

We think the following additional quotation from the minority opinion (pp. 274-275) is an unanswerable argument that the construction of said statutes by the Supreme Court of Wisconsin, renders them invalid as depriving the appellant of property without due process of law:

"While the above is sufficient in my opinion to require reversal of the judgment herein and the granting of an injunction, I wish to say further that in the instant case, however it may be in the American Furniture Co. Case, supra, the picketing involved in my opinion deprives the plaintiff of liberty and property without due process of law. The Fifth Amendment to the Constitution of the United States declares that no person shall be so deprived. If no person shall be so deprived, then no person shall so deprive him. Injury to business is the deprivation of property. Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 128, 66 L. Ed. 254, 27 A. L. R. 375. To deprive one of his right to labor is to deprive him of his liberty. Allgeyer v. Louisiana, 165 U. S. 578, 589, 17 S. Ct. 427, 431, 41 L. Ed. 832. Under the facts of the case, the picketing involved injures the plaintiff's business, deprives him of opportunity to labor, and inflicts irreparable injury upon him for which he has no adequate remedy at law. Hence the picketing should be enjoined, unless the injury resulting to the plaintiff from it is effected through due process of law.

" 'The right to follow any of the common occupations of life is an inalienable right. * * ** This right is a large

ingredient in the civil liberty of the citizen. * * * The right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.' Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co., 111 U. S. 746, 762, 764, 765, 4 S. Ct. 652, 657, 28 L. Ed. 585. The liberty mentioned in the Fifth Amendment as well as the Fourteenth Amendment 'means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.' Allgeyer Case, supra. As quoted in Cameron v. International Alliance of T. S. E. and M. P. O., 118 N. J. Eq. 11, 176 Atl. 692, 698, 97 A. L. R. 594:

"'There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor.' * * *

"'The right of a workman to the "free use of his hands" has been described as one "of which the Legislatures cannot deprive him, one which the law of no trades union can take from him, and one which it is the bounden duty of the courts to protect." * * * "A man may not barter away his life or his freedom, or his substantial rights." Home Ins. Co. v. Morse, 20 Wall. 445, 451, 22 L. Ed. 365.'

"These statements imply that the right to labor with one's own hands when one will and as he will, the right to follow a chosen occupation or business, the right to earn one's own living, and the right to contract are so sacred, so valuable, so important to the individual, that no one may be coerced into giving them up, and when as here the means of coercing their surrender results in irreparable injury to the individual, the coercion should upon established principles of equity be enjoined. We are not here concerned with licensing restrictions or the

like imposed under the police power for the protection of the public. We need only consider the facts of the instant case to perceive the denial and deprivation of liberty of the plaintiff and I perceive no 'due process' by which the result is produced." (R. 124-125)

The majority opinion held that under its construction of Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, picketing by a labor union against an employer for the purpose of compelling him to give up his right to work in his own business with his own hands was made lawful by said statutes, despite the fact that none of the employees of the employer were members of the union and despite the fact that the labor union represented none of the employees for collective bargaining. It stated in this connection:

"Appellant has declined to sign the suggested contract unless there be eliminated therefrom the provisions which require him to desist from working with his tools and his helping generally in the work of installing material. Respondents insist that the particular rule to which appellant objects is one in the furtherance of the legitimate interests of the members of the unions. In view of our decision in the American Furniture Co. Case, supra, and the cases there analyzed in the opinion written by Mr. Justice Wickhem, it is apparent that, under the laws of Wisconsin, where the primary purpose of the acts complained of is to protect and improve the condition of those whom the unions represent, such action is justifiable, because it tends to promote the welfare of the members of the union engaged in the same craft. There is no effort to induce or compel the appellant to do any unlawful thing. If it be assumed that appellant cannot operate his business successfully upon the conditions insisted upon by the respondents, still no right of appellant now protected by law is invaded by respondents' efforts to bring appellant's business to union standard. American Furniture Co. v. I. B. of T. C. and H. of A., Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, supra, and cases there cited. No question exists as to appellant's right to conduct a

nonunion shop under any terms he chooses. An economic contest has developed. Each of the contestants is desirous of the advantage of doing the business in the community where he or they operate. He is not obliged to yield to the persuasion exercised upon him by respondents." (R. 120-121)

How can this decision be squared with the language of this court in *Hitchman Coal & Coke Co. v. Mitchell,* 245 U. S. 229, 253-254, 62 L. Ed. 260:

> "Defendants set up, by way of justification or excuse, the right of workingmen to form unions, and to enlarge their membership by inviting other workingmen to join. The right is freely conceded, provided the objects of the union be proper and legitimate, which we assume to be true, in a general sense, with respect to the Union here in question. * * * The cardinal error of defendants' position lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others. (citing cases) The familiar maxim 'Sic utere tuo ut alienum non laedas'—literally translated, 'So use your own property as not to injure that of another person,' but by more proper interpretation, 'so as not to injure *the rights* of another' * * * —applies to conflicting rights of every description. For example, where two or more persons are entitled to use the same road or passage, each one, in using it, is under a duty to exercise care not to interfere with its use by the others, or to damage them while they are using it."

—or the statement in the case of *Butchers' Union Slaughter-House and Live Stock Landing Company v. Crescent City Live Stock Landing and Slaughter-House Company,* 111 U. S. 746, 764-765, 28 L. Ed. 585:

> "I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States. It was held by a majority of the court in the former decision of the *Slaughter-House Cases,* 16 Wall., 57 (83 U. S. XXI.,

402); that the 'Privileges and immunities of citizens of the United States' mentioned and referred to in the 14th Amendment, are only those privileges and immunities which were created by the Constitution of the United States and grew out of it or out of laws passed in pursuance of it. I then held and still hold, that the phrase has a broader meaning; that it includes those fundamental privileges and immunities which belong essentially to the citizens of every free government, among which *Mr. Justice* Washington enumerates the right of protection; the right to pursue and obtain happiness and safety; the right to pass through and reside in any State for purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of any kind in the courts of the State; and to take, hold and dispose of property, either real or personal. *Corfield v. Coryell,* 4 Wash. (C. C.), 371. These rights are different from the concrete rights which a man may have to a specific chattel or a piece of land or to the performance by another of a particular contract, or to damages for a particular wrong, all of which may be invaded by individuals; they are the capacity, power or privilege of having and enjoying those concrete rights and of maintaining them in the courts, which capacity, power or privilege can only be invaded by the State."

—or the holding in *Coppage v. Kansas,* 236 U. S. 1, 17, 59 L. Ed. 441, where this court said:

> "But the 14th Amendment, in declaring that a state shall not 'deprive any person of life, liberty, or property without due process of law,' gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as coexistent human rights, and debars the states from any unwarranted interference with either."

—or the holding in *Truax v. Raich,* 239 U. S. 33, 41, 60 L. Ed. 131, where this court said:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. Butchers' Union S. H. & L. S. L.

> Co. v. Crescent City L. S. L. & S. H. Co., 111 U. S. 746, 762, 28 L. ed. 585, 588, 4 Sup. Ct. Rep. 652; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Yick Wo v. Hopkins, supra; Allgeyer v. Louisiana, 165 U. S. 578, 589, 590, 41 L. ed. 832, 835, 836, 17 Sup. Ct. Rep. 427; Coppage v. Kansas, 236 U. S. 1, 14, 59 L. ed. 441, L. R. A. 1915C, 960, 35 Sup. Ct. Rep. 240."

We respectfully submit that *Truax v. Corrigan,* 257 U. S. 312, 66 L. Ed. 254, is conclusive on the point that the Wisconsin Labor Code, as construed by the Supreme Court of the State of Wisconsin in the case at bar, violates Section 1 of the Fourteenth Amendment to the Constitution of the United States on the ground that it deprives appellant of property without due process.

In the *Truax* case, this court had before it for determination the validity, under the Fourteenth Amendment to the United States Constitution, of an Arizona statute, as construed by the Supreme Court of Arizona, limiting the power of the courts of Arizona to issue injunctions in labor disputes. We call particular attention to the fact that in the *Truax* case, the picketing and related activities were indulged in by a labor union actually representing employees of the plaintiff who were on strike. After laying down the principle that business is a property right within the due process guaranty of the Fourteenth Amendment and that intentional injury thereto by conspiracy is a tort, Mr. Chief Justice Taft, speaking for the court, stated:

> "It is argued that while the right to conduct a lawful business is property, the conditions surrounding that business, such as regulations of the state for maintaining peace, good order, and protection against disorder, are matters in which no person has a vested right. The conclusion to which this inevitably leads in this case is that the state may withdraw all protection to a property right by civil or criminal action for its wrongful injury, if the injury is not caused by violence. * * * It is true

that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the 14th Amendment is intended to preserve, *and that a purely arbitrary or capricious exercise of that power, whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles.*" (Italics ours) (pp. 329-330)

As we heretofore pointed out, in the *Truax* case there was an active employer-employee labor dispute and the acts sought to be enjoined by the employer were acts engaged in by the union and its members in connection with said dispute. If the union in the *Truax* case, as in the case at bar, had not represented any of the employer's employees and the acts were not in furtherance of strike activities, what this court would have said in the *Truax* case, in addition to what it did say, can well be imagined. This appears clearly from the following statement of the court in the *Truax* case, which was made in answer to the argument that workmen's compensation laws were sustained which deprived an employer of defenses theretofore available to him:

> "They (these cases) hold that employers have no vested right in those rules of the common law. The broad distinction between one's right to the protection against a direct injury to one's fundamental property right *by another who has no special relation to him, and one's liability to another with whom he establishes a voluntary relation* under a statute, is manifest upon its statement." (p. 329) (Italics ours)

So here the fundamental right of Senn to labor in his own business, and remedies necessary to the protection thereof, cannot be taken away from him. There is no basis under any conception of public welfare by which the police power of the State of Wisconsin could be used to hand over to the

labor unions the right to deprive Senn of this constitutional privilege, which is more sacred and more deserving of protection by any government than almost any other right except life itself. The dissenting opinion of the Wisconsin Supreme Court ably states this proposition thus:

> "The only provision of the proposed contract to which he will not accede is the one denying him the right to labor with his own hands and tools upon the jobs he contracts to perform. He has not sufficient capital to enable him to take any but small jobs. Such jobs as he can handle will yield no profit unless he works upon them himself. He cannot make a living at laying tile as a journeyman without membership in the defendant union, and that is denied him because he has not served three years as apprentice to a journeyman tile layer, and without such membership he cannot procure sufficient employment as a journeyman. To picket his jobs will injure his business as a contractor and reduce his earnings below sufficiency for support of himself and family. Destruction of plaintiff's business through picketing is the object of the defendants and is likely to be attained if the picketing be continued, with resulting liability imposed upon the public for the support of himself and family, with resulting loss to the public of the benefit of his services as a tile layer, denial to the public of the benefit of his competition and, as it is the expressed purpose of the defendants to apply the restriction that it would place upon the plaintiff to all journeymen tile layers who shall aspire to become contractors, with resulting imposition upon the public of a monopoly of the tile laying business in the hands of members of the defendant union. Business in contracting for such work as tile laying ordinarily begins with small beginnings, and if successful gradually extends to more considerable proportions. The plaintiff's road to success in such business is blocked, and the entry into such business is blocked to every worker, by the requirement of the defendants to which plaintiff objects. The requirement that no contractor shall work with his own hands and his own tools upon a job would foreclose every worker, union as well as nonunion, from entering the contracting business unless he has or is able to procure capital other-

wise not necessary for entry into and prosecution of the business to success. I cannot believe that such result is made lawful by the claim that it is nothing but economic pressure applied to the furtherance of the cause of workers as a whole or of that class of workers belonging to labor unions. The view here expressed of right to an injunction under the situation here involved has the support of the only courts that have ever passed on situations closely similar. Roraback v. Motion Picture Machine Operators' Union, 140 Minn. 481, 168 N. W. 766, 169 N. W. 529, 3 A. L. R. 1290; Hughes et al. v. Kansas City Motion Picture M. O. Local No. 170 et al., 282 Mo. 304, 221 S. W. 95; Parker Paint & Wall Paper Co. v. Local Union No. 813 et al., 87 W. Va. 631, 105 S. E. 911, 16 A. L. R. 222." (R. 126-127)

It was well stated in *Roraback v. Motion Picture Machine Operators' Union,* 169 N. W. 529, 140 Minn. 481, 485, 3 A. L. R. 1290:

"If, men, either singly or in combination, may lawfully injure or destroy the business of another for the purpose of compelling him not to work in such business himself, it will have far-reaching consequences. Such a doctrine would limit the field of business to those who have sufficient capital to carry on a business without becoming operatives therein themselves, and would debar those who have little or no capital, except their personal skill and ability, from seeking to better their condition by engaging in business on their own account. Such a doctrine means that a machinist who starts a machine shop may lawfully be prevented from working therein as a machinist; that a carpenter who starts a carpenter shop may be required to have all his work done by others; that a barber who opens a barber shop must cease to work as a barber. It means that the man in any occupation who starts in business for himself, relying upon his personal skill and ability to attain success, must forego the right to profit by his own skill, at the arbitrary behest of another, or see his business ruined. Such is not the law. The right of every person to work in his own business is a fundamental right, guaranteed to him by the Bill of Rights in the Constitution and by the 14th Amendment to the Federal Con-

> stitution, and any attempt to deprive him of that right is necessarily unlawful. Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283. However far members of an organization may go in an attempt to force an employer to employ members of the organization, an attempt to force him to desist from working himself in his own business is clearly an invasion of the rights secured to him by the Constitution." (Citing cases)

And, as is well said in the minority opinion in the Senn case, the only courts that have passed on this situation take the same position as to the interference by unions with the sacred right of one to labor in his own business.

In addition to the case of *Roraback v. Motion Picture Machine Operators' Union,* 169 N. W. 529, 140 Minn. 481, 3 A. L. R. 1290, we cite the following cases:

> *Hughes, et al. v. Kansas City Motion Picture M. O. Local No. 170 et al,* 282 Mo. 304, 221 S. W. 95.
>
> *Parker Paint & Wall Paper Company v. Local Union No.* 813, *et al.* 87 W. Va. 651, 105 S. E. 911, 16 A. L. R. 222.

In *New State Ice Co. v. Liebmann,* 285 U. S. 262, 278, 76 L. Ed. 747, this court said:

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the 14th Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

And so in the case at bar, as is stated in the *Liebmann* case at page 279:

"The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it."

To the same effect as to the right of the state, under the guise of protecting the public, arbitrarily to interfere with private business, see:

Burns Baking Co. v. Bryan, 264 U. S. 504, 68 L. Ed. 813, 32 A. L. R. 661.

Liggett Co. v. Baldrige, 278 U. S. 105, 73 L. Ed. 204.

In the latter case, this court said, in passing upon a Pennsylvania statute requiring all pharmacies to be owned by duly licensed pharmacists (p. 113):

"A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

We respectfully submit that it must necessarily follow that a state cannot, under the guise of the police power, for the purpose of promoting unionism, interfere with the right of a man to work in his own business by denying protection to that right when invaded by the organized activity of others.

In *Allgeyer v. Louisiana,* 165 U. S. 578, 589, 41 L. Ed. 832, 17 S. Ct. 427, this court said:

"The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; *to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation,* and for that

purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." (Italics ours)

See also *Adair v. United States*, 208 U. S. 161, 52 L. Ed. 436.

It is, of course, assumed throughout this argument that the right to labor, important as it is to the individual, is not an absolute right. It is submitted, however, that this basic right of an individual is not subject to infringement and impairment by the state under the guise of a public policy designed to give labor unions what the legislature conceives to be advantages, on the ground that it is better for the people of the state that unions control the business field in the employer-employee relationship, when such control, as here exercised, shuts off the path of the individual to go into a legitimate business for himself.

It is asserted by the appellant that the construction of the Supreme Court of Wisconsin of this legislative enactment makes the enactment an unreasonable invasion of appellant's right of liberty and property, and it is respectfully submitted that the statutes, construed so as to deny appellant relief from interference with his right to work, violates Section 1 of the Fourteenth Amendment to the Federal Constitution.

Whether or not the appellant was qualified to do the work which he was doing in his own business is quite beside the point, and, we submit, entirely immaterial. Be that as it may, it is clearly established that the appellant was fully experienced and capable of doing the work which he was doing in his own business. (R. 50, 64-65, 81-82, 83, 99-100). Even if the appellant was not qualified, we respectfully submit that the legislature could not delegate to labor unions

the right to pass upon the qualifications of a person to work in his own business.

As pointed out in the minority opinion, if the appellant gave up his business as a contractor because he would not be able successfully to continue the same without working with his own hands, "his opportunity to work at his trade as a layer of tile would be diminished or destroyed because of exclusion from membership in the defendant union because he has not served three years as an apprentice under a journeyman tile layer. It is nonsense to claim that three years of such apprenticeship is necessary to enable a competent plasterer to lay tile. It is without dispute that the plaintiff was a competent plasterer before he took up the trade of laying tile and it is without dispute that he is now a competent tile layer. The unreasonableness of the requirement of apprenticeship ties up with the unreasonableness of the restriction of the plaintiff's right to follow his chosen occupation of a tile layer and as a contractor of tile jobs." (R. 123-124)

If labor unions can be given the power to picket and interfere with the right of an individual to work with his own hands in his own business, and, in effect, force him to give up this right, we have the anomolous situation where a group of individuals has a power not vested in the government itself under the facts here involved. Such labor unions are then more powerful than any government and subject to none of the limitations or restrictions to which governments are subject.

We respectfully submit that such power cannot be delegated consistent with the guarantees afforded citizens of the United States under Section 1 of the Fourteenth Amendment to the Federal Constitution.

POINT II.

The Wisconsin Labor Code, as Construed by the Supreme Court of Wisconsin, Denies Appellant the Equal Protection of the Laws.

The evidence set forth under Point I is equally applicable to this point.

Under Article VII, Section 8, of the Wisconsin Constitution, it is provided that circuit courts shall have the power to issue writs of injunction, and under Article VII, Section 2, of the Wisconsin Constitution, it is provided that "the judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace." (See Appendix page 62)

Section 268.01 of the Wisconsin Statutes of 1935 provides:

> *"Order substituted for injunction.* The writ of injunction is abolished. An injunction may be the final judgment in the action or may be allowed as a provisional remedy therein; and when so allowed it shall be by order as prescribed by this chapter."

It is also provided in subsection (1) of Section 268.02 of the Wisconsin Statutes of 1935, as follows:

> *"Temporary injunction; when granted.* (1) When it appears from his pleading that a party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure him, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act."

Thus, the decision of this court in *Truax v. Corrigan*, 257 U. S. 312, 66 L. Ed. 254, to the effect that, inasmuch

as the statutes there involved denied the employer equitable relief, it denied him the equal protection of the laws under the Fourteenth Amendment to the United States Constitution is entirely applicable to the facts in this case.

In speaking of the provisions of the Arizona Constitution and the Arizona Statutes which were substantially similar to the foregoing constitutional and statutory provisions of Wisconsin, this court stated in the *Truax* case:

> "The necessary and resulting effect of these provisions and of Section 1464 is that the plaintiffs in error would have had the right to an injunction against such a campaign as that conducted by the defendants in error, if it had been directed against the plaintiffs' business and property in any kind of a controversy *which was not a dispute between employer and former employees.*" (Italics ours) (p. 331)

This court then went on to say in the *Truax* case:

> "The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. (pp. 332-333)
>
> • • •
>
> " • • • If, as is asserted, the granting of equitable remedies falls within the police power, and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause, which forbids the granting of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction.
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> • • •
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> " • • • Here is a direct invasion of the ordinary business and property rights of a person, unlawful when committed by anyone, and remediable because of its otherwise irreparable character by equitable process, except when committed by ex-employees of the injured person. If this is not a denial of the equal protection

of the laws, then it is hard to conceive what would be. To hold it not to be, would be, to use the expression of Mr. Justice Brewer in Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255, to make the guaranty of the equality clause 'a rope of sand.'" (pp. 334-336)

Particularly significant in relation to the facts in the case at bar is the following language of this court in the *Truax* case (p. 339):

> "It seems a far cry from classification on the basis of the relation of employer and employee in respect of injuries received in course of employment to classification based on the relation of an employer, not to an employee, *but to one who has ceased to be so,* in respect of torts thereafter committed by such ex-employee on the business and property right of the employer. It is really a little difficult to say, if such classification can be sustained, why special legislative treatment of assaults upon an employer or his employees by ex-employees may not be sustained with equal reason. It is said the state may deal separately with such disputes because such controversies are a frequent and characteristic outgrowth of disputes over terms and conditions of employment. Violence of ex-employees toward present employees is also a characteristic of such disputes. Would this justify a legislature in excepting ex-employees from criminal prosecution for such assaults, and leaving the assaulted persons to suits for damages at common law?
>
> "Our conclusion, that plaintiffs are denied the equal protection of the laws is sustained by the decisions in this court. * * * "

We respectfully submit that the line of reasoning applied by this court in the *Truax* case has added force and, if possible, even greater conviction, when applied to the situation involved in the case at bar. Here the parties against whom relief is demanded had no dispute with the appellant concerning the wages, hours or working conditions of his employees and *the sole dispute was over his refusing to give*

up his right to work in his own business with his hands and tools. The line of reasoning applied by this court is also more convincingly applicable here when it is considered that *the appellee unions at no time represented any of the appellant's employees and,* so far as his business was concerned, *appellees were total strangers to him.*

In *In re Opinion of the Justices,* 275 Mass. 580, 176 N. E. 649, 654, the Supreme Judicial Court of Massachusetts, in passing on the Massachusetts bill substantially similar to the statutes here involved, stated:

> "However that may be, one dominating aim of this part of the bill seems to be to establish with respect to every 'labor dispute' as defined in section 12 (c) a substantially different method of procedure, subject to materially different prerequisites, conditions, rules of trial and extent of redress, from that established in any other kind of controversy where relief in equity is sought. This dominating purpose appears to be class legislation and to impair equality before the law and equal protection of equal laws to all persons, contrary to principles affirmed in Bogni v. Perotti, 224 Mass. 152, 112 N. E. 853, L. R. A. 1916F, 831, and Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375."

And, likewise, it was said by the Supreme Court of New Hampshire, *In re Opinion of the Justices,* 86 N. H. 597, 166 Atl. 640, 645, in commenting, among other things, upon Section 3 of the proposed New Hampshire bill, which was very much like the statutes here involved:

> "Judged by the standard thus set, it is our opinion that an act denying to employers of labor any part of the full right accorded to others to resort to the courts for relief would be unconstitutional. Such is the purport of many of the provisions contained in sections 3 to 9 of the proposed bill, and to this extent it would not become a valid law if enacted.
>
> "For like reasons the Federal Supreme Court has held similar provisions in a state statute to be invalid

under the Federal Constitution. Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375."

And it is well said further in this opinion at page 645:

> "It may be added that many of the activities described in section three and commonly employed in the conduct of a strike are such that no court would enjoin them, except in a case where the strike itself was illegal, either in its inception or in its execution But if, for example, the strike were instituted or carried on in the execution of a conspiracy to injure the employer, all means for its furtherance might be enjoined. The bill makes no such distinction."

And here, in the case at bar, *we have no strike.* We have a concert of activities by outsiders who have no relation to the appellant, the purpose of which is to make appellant do their will at the sacrifice of his right to labor as he chooses, and the Supreme Court of Wisconsin has held that it cannot protect that right because of statutes similar to those under consideration in the New Hampshire advisory opinion.

We respectfully submit that no classification can be reasonably made and sustained which will give *any* group the right to picket, boycott and molest an individual *for the purpose of forcing him, against his will, to agree not to work with his own hands in his own business.* A legislative classification which denies *employers* as a class injunctive relief from such activities engaged in *for that purpose,* while such relief is accorded individuals who are not employers, is wholly unreasonable, arbitrary and discriminatory and cannot be sustained as a valid exercise of police power.

Even if picketing for the purpose of forcing an individual employer not to work with his own hands could conceivably be legalized by a state statute in a given situation, we respectfully submit that any such statute sanctioning

such activity for such purpose by a group, *neither employees nor ex-employees of the employer and not representing any of them,* is clearly discriminatory and arbitrary and cannot be sustained under any theory as a proper exercise of police power.

It appears that appellant is denied relief against appellees merely by reason of the fact that appellees are labor unions having in their memberships employees of other employers in the same crafts. Unquestionably, appellant would have obtained the relief sought but for the fact that appellees were such labor unions. This appears from the statement contained in the majority opinion of the Supreme Court of Wisconsin in this case to the effect that "where the primary purpose of the acts complained of is to protect and improve the condition of those whom the unions represent, such action is justifiable, because it tends to promote the welfare of the members of the union engaged in the same craft." (R. 121)

If the denial of relief to appellant can be sustained on the ground thus stated by the Supreme Court of the State of Wisconsin in the majority opinion, picketing and related activities against an individual *employing no one,* carried on for the purpose of forcing him to give up his work; if carried on by labor unions to further the interests of their members, should likewise not be restrained. If not, any classification which permits picketing against an employer for the purpose of forcing him to agree not to work with his own hands and accords relief to an individual working for himself and not employing any help is wholly without reason and is entirely arbitrary and capricious and cannot be squared with the requirement for the equal protection of the laws guaranteed under Section 1 of the Fourteenth Amendment to the Federal Constitution.

We respectfully submit that Mr. Justice Fowler, in his dissenting opinion in this case, which was concurred in by Mr. Justice Nelson, had the correct understanding when he stated:

> "And as I understand the welfare requirement, the welfare served must be that of the public, not that of a particular class of the public to the detriment of another class of the public. To rule that peaceful picketing in every case is lawful, would serve the interest of organized labor to the detriment of unorganized labor and not induce to the welfare of the public as a whole. * * * To justify statutes affecting one class of the society to the detriment of another class, if there can be any such justification, the advantage to the one class must at least so overbalance the disadvantages to the other that the welfare of the public as a whole is thereby advanced. The instant statute, if applied to the situation here involved, in my opinion does not meet these tests." (R. 130)

We respectfully submit that the statutes in question, as construed by the Supreme Court of Wisconsin, clearly violate the guaranty of equal protection of the laws to the appellant prescribed in Section 1 of the Fourteenth Amendment to the Federal Constitution for the reason that the classifications made under the statute, which deny him relief against the activities of the appellees merely because of the fact that he is an employer or merely because of the fact that the appellees are labor unions, are wholly unreasonable, arbitrary and capricious and have no relation to the public health, safety, good order or welfare and are statutes intended to and having the effect of merely furthering the interests of one group at the expense of another.

POINT III.

Inasmuch as None of Senn's Employees Were Members of Appellee Unions and Said Unions Represented None of His Employees, the Statutes, Construed so as

to Deny Senn the Right to Relief from Picketing and Related Activities by Said Unions, Deprived Him of Liberty and Property Without Due Process and Denied Him the Equal Protection of the Laws.

The trial court found, upon undisputed evidence, in Finding of Fact No. 7, as follows:

> "7. That none of the employees of the plaintiff were at the time of the commencement of this action members of either of said defendant unions; that no contractual relation of any kind exists between the plaintiff and the defendant unions; that the defendant unions have not been designated by any of the plaintiff's employees as their agent for collective bargaining or for any other purpose." (R. 26)

This was the precise situation in the case of *American Furniture Company v. I. B. of T. C. and H. of A., etc.*, 268 N. W. 250, (not yet officially reported) decided by the Supreme Court of Wisconsin on the same day it decided the *Senn* case. In that case the Supreme Court of Wisconsin upheld, as against the Fourteenth Amendment to the Constitution of the United States, the statutes in question here. In its opinion on the motion for rehearing in the *Senn* case, the Supreme Court of Wisconsin referred to the *American Furniture Company* case as having disposed of the contentions of Senn in this case in regard to the constitutionality of these statutes and said:

> "These contentions were urged in the original brief of plaintiff, were fully considered by this court in the decision of this case, and held to be without merit. These claims were not more particularly treated in the opinion deciding this case, because, as disclosed in the opinion, the views of this court upon the constitutional questions raised were decided adversely to the contentions of plaintiff in the case of American Furniture Co. v. I. B. of T. C. and H. of A. etc., 268 N. W. 250, decided at the same time." (R. 132)

"It is submitted that these statutes, construed by the Supreme Court of Wisconsin as permitting an absolute stranger to an employer, upon his refusal to comply with certain demands, to picket and banner such employer to force him to accede to such demands, deny to appellant due process of law and the equal protection of the laws.

It was stated by this court, in *Truax v. Corrigan,* 257 U. S. 312, 337, 66 L. Ed. 254, with reference to this sort of classification:

> "But we venture to think that not in any of the cases in this court has classification of persons of sound mind and full responsibility, having no special relation to each other, in respect of remedial procedure for an admitted tort, been sustained. Classification must be reasonable. As was said in Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 155, 41 L. ed. 668, 17 Sup. Ct. Rep. 255, classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' As was said in Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594: 'The rule . . . (i. e., of the equality clause) is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations."

Considering the contention that the classification between employers and ex-employees was reasonable and valid, this court stated in the *Truax* case, at page 339:

> "It is really a little difficult to say, if such classification can be sustained, why special legislative treatment of assaults upon an employer or his employees by ex-employees may not be sustained with equal reason."

In fact, such a statute was proposed in Massachusetts and was the subject of an advisory opinion, *In re Opinion of*

the Justices, 211 Mass. 618, 98 N. E. 337. The proposed statute provided that an action against a trade union or an association of employers, or against members or officials thereof, on behalf of themselves and of other members of a trade union or association of employers, shall not be entertained by any court. In the advisory opinion, the court held that such a statute would be in conflict with the Fourteenth Amendment, and said at page 619:

> "The proposed bill to exempt associations of employers and trade unions and their members and officials from actions of tort committed by or on behalf of such association or union is plainly contrary to these constitutional guarantees. It gives to certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs which is a sign of equality between citizens and residents. It undertakes to clothe combinations of employers and laborers with special power denied to other employers and laborers and other members of society. In another respect, it deprives all individuals and associations, other than those named, of the protection to safety, liberty and property which any free government must secure to its subjects. * * * It imposes upon some burdens of which others in like situation are relieved. *It throws obstacles in the pathway of those outside unions or associations in the pursuit of their livelihood and in the prosecution of their business not interposed in the way of members of such organizations.* It purposes to give to one class of wage-earners advantages withheld from others not belonging to a trade union who are engaged in the same kind of work and for the same employer. It frees one set of employers from obligations to which their competitors, who are independent of the association, are subjected. In short, it destroys equality and creates special privilege." (Italics ours)

In the *American Furniture Company* case, 268 N. W. 250, the Supreme Court of Wisconsin, in the majority opinion, said at page 265:

"The law plainly protects not the unorganized individuals constituting the employees, but the right of employees to act in groups or associations. It deals with the collective effort of employees to better their conditions, and it is only their activities in this direction that are brought within the protection of the statute. *The rights of employees not to organize and not to name bargaining agents is neither fostered nor protected.* Where the employees have neither organized and named their bargaining representatives nor taken any steps so to organize, we see nothing in the act which prohibits the employer selecting their bargaining agent by contract with a labor union which is not subject to his domination. Such a step promotes rather than defeats the purpose of the code." (Italics ours)

At page 263, the majority opinion says:

"We conclude that defendant unions had standing under the act, although representing none of the members of their craft employed by plaintiff, and although there was no dispute between plaintiff and its employees, to be a disputant with plaintiff, and that unionization of plaintiff's store could constitute a proper subject for dispute. We further conclude that the act, so construed, is not repugnant to any constitutional provision."

A few months before the decision of the Supreme Court of Wisconsin in the *American Furniture Company* case, the U. S. Circuit Court of Appeals for the Seventh Circuit had before it the same question, that is, whether or not a labor dispute under the Norris-La Guardia Act and the Wisconsin Labor Code existed where the demanding union did not represent any of the employees of the employer and where none of the employees of the employer were members of the union, and whether a demand of that nature by the union, under such circumstances, was unlawful. This was on appeal from an interlocutory order of the United States District Court for the Eastern District of Wisconsin, enjoining the union and its representatives from picketing the

plaintiff's markets in Milwaukee. *Edward Lauf v. E. G. Shinner & Co.*, 82 F. (2d) 68, decided February 29, 1936. In the *Lauf* case, the Circuit Court of Appeals for the Seventh Circuit followed its decision in the case of *United Electric Coal Companies v. Rice*, 80 F. (2d) 1, decided October 26, 1935, in which case a writ of certiorari was denied by this court on March 2, 1936, and held that no labor dispute existed and the employer was entitled to injunctive relief.

To the same effect, on the construction of the statute that no labor dispute existed under the same conditions, are the following cases:

Safeway Stores, Inc. v. Retail Clerk's Union, 51 P. (2nd) (Wash.) 372, 379, decided in December, 1935.

218-220 *Market St. Corp. v. Delicatessen, etc. Union*, 118 N. J. Eq. 448, decided July 15, 1935.

The majority opinion of the Wisconsin Supreme Court in the *American Furniture Company* case noted the decision in the *Lauf* case, but refused to follow it, and held that under the same circumstances a labor dispute existed; that the union had the right to picket the American Furniture Company for the purpose of forcing the American Furniture Company to coerce its employees to join the union and that sections 103.51 to 103.63 of the Wisconsin Statutes of 1935, so construed, were constitutional and valid and did not violate the Fourteenth Amendment to the Constitution of the United States.

In the minority opinion in the *American Furniture Company* case by Mr. Justice Fowler, who wrote the minority opinion in the *Senn* case, it was held that the same construction of the statutes adopted by the Circuit Court of Appeals of the Seventh Circuit in the *Lauf* case was the correct construction. In considering what was intended by said Wisconsin Statutes and by Congress in the enactment of the

Norris-La Guardia Act, 29 U.S.C.A., Sections 101 to 115, which is very similar to the Wisconsin Labor Code, and, among other things, limits the power of the lower federal courts as to the issuance of injunctions in labor disputes as defined in that act, said minority opinion stated at pages 267-268:

> "I am not unmindful of the contention of respondents that when the bill that was enacted into the federal statute was before the Congress of the United States, the view of the sponsors of the bill was that it would cover every sort of labor controversy. Nor am I unmindful of statements in the reports of Committees of the houses of Congress to the effect that it was intended to cover deficiencies in the Clayton Act and was conceived as covering labor disputes not within that act. Perhaps it was contemplated by the sponsors of the bill that it covered all sorts of labor disputes. Nevertheless the bill was so framed as not to cover any controversies except those arising between employer and employee. It was intended to cover the point of outside labor organizations espousing the cause of employees when a controversy existed between them and their employer, and there is nothing in the act itself or in the statements in the committee reports to indicate that any controversy except such as arose primarily between employer and employee was in mind. The construction of the act urged by the respondents and upheld by this court would authorize any labor union in Milwaukee or elsewhere to picket every manufacturing plant and every retail mercantile establishment in the state that would not compel its employees against their wishes and when entirely satisfied with their wages and their conditions and hours of labor, to form and join a labor union, or join an existing labor union, or be discharged. I do not believe that the Legislature or the Congress intended or imagined that the bill would legalize such picketing."

It is submitted that a demand upon an employer by a union having no contractual relations with him, having none of his employees in its membership, and representing none of his employees, that he cease to work with his own

hands in his own lawful business is so shocking and so intolerable that the natural inference of the human mind would be that under constitutional government no statute could legalize picketing, the object of which is to force submission to such a demand. Such a demand goes to the very foundation of a person's life. If carried out to its logical result, it would prevent anybody from going into business for himself where it is necessary for him, in order to conduct that business, to work for himself, if a labor union conceived it to be to the interest of its members to stop any newcomer from doing that work.

The very startling result of such a situation indicates that if such demands so made by such persons, and such conduct as is here shown to be indulged in to enforce such demands, is held permissible, the liberty of the individual to make a livelihood in his own business by his own work is gone—gone because persons in the some line of business feel that their welfare would be promoted by compelling him to let someone else do the work which he wanted to do himself. We submit that this is in utter disregard of the relation of public good to individual liberty, and that a man's right to labor, which is of the very essence of individual liberty, cannot be impaired by legislative enactments designed, as the Supreme Court of Wisconsin said in the majority opinion in the *American Furniture Company* case, for the purpose of protecting the organized worker and not the unorganized worker, or, as the same court said in the *Senn* case in the majority opinion at page 273:

> "In view of our decision in the American Furniture Co. Case, supra, and the cases there analyzed in the opinion written by Mr. Justice Wickhem, it is apparent that, under the laws of Wisconsin, where the primary purpose of the acts complained of is to protect and improve the condition of those whom the unions represent, such action is justifiable, because it tends to promote the welfare of the members of the union engaged in the same craft." (R. 121)

It is respectfully submitted that, regardless of the right of the legislature to legislate concerning the rights and methods of collective bargaining and to make lawful such conduct as is free from fraud and violence, it is a far cry to say that the state legislature can sanction the activities directed against this appellant by unions, strangers to him and his employees, without depriving appellant of property without due process of law and denying him the equal protection of the laws. With respect to the denial of the equal protection of the laws, we do not think that any parallel can be conceived in which third persons can visit such conduct upon another, and that in no situation, relationship, walk of life or classification can such a thing for a moment be thought of as permissible.

Could the legislature, conceiving operation of chain stores to be in the public interest, pass a statute making it lawful for operators of chain stores to picket stores independently owned for the purpose of forcing them into the chain store combination on the ground that the public interest would be served through more employment, better wages and cheaper prices? We think the mere statement of this question answers itself. The basis for that classification would be no different, no sounder nor any less arbitrary, in any view of economic philosophy, than the classification here involved. We state, as did the minority in the dissenting opinion:

The practice upheld by the majority of the court is Un-American, oppressive and intolerable. It is contrary to the concept that we have always had of the fundamental and inalienable rights of the individual citizen secured to him by the Constitution of the United States. We will not yield that concept until it is declared erroneous by the final arbiter of that constitution. Our concept of the inherent rights of man under the Constitution may be merely an ideal that we may eventually have to give up, but we are

still strong in our faith in it; and we will ever cherish it unless it shall be destroyed by the ultimate authority, the Supreme Court of the United States.

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Wisconsin, affirming the judgment of the Circuit Court of Milwaukee County, Wisconsin, denying the appellant the injunctional relief which he sought, be reversed with directions to the Supreme Court of Wisconsin to direct the trial court to grant the relief requested by the appellant in his complaint.

All of which is respectfully submitted.

LEON B. LAMFROM,

Counsel for Appellant.

APPENDIX

WISCONSIN LABOR CODE

(Wisconsin Statutes of 1935)

103.51 *Public policy as to collective bargaining.* In the interpretation and application of sections 103.51 to 103.63 the public policy of this state is declared as follows:

Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employes. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and the designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

103.52 *"Yellow-dog" contracts.* Every undertaking or promise made after the taking effect of this action, whether written or oral, express or implied, between any employe or prospective employe and his employer, prospective employer or any other individual, firm, company, association, or corporation, whereby

(1) Either party thereto undertakes or promises to join or to remain a member of some specific labor organization or organizations or to join or remain a member of some spe-

cific employer organization or any employer organization or organizations; or

(2) Either party thereto undertakes or promises not to join or not to remain a member of some specific labor organization or any labor organization or organizations, or of some specific employer organization or any employer organization or organizations; or

(3) Either party thereto undertakes or promises that he will withdraw from an employment relation in the event that he joins or remains a member of some specific labor organization or any labor organization or organizations, or of some specific employer organization or any employer organization or organizations;

Is hereby declared to be contrary to public policy and shall not afford any basis for the granting of legal or equitable relief by any court against a party to such undertaking or promise, or against any other persons who may advise, urge or induce, without fraud, violence, or threat thereof, either party thereto to act in disregard of such undertaking or promise. This section in its entirety is supplemental to and of subsection (1) of section 103.46 of the statutes.

103.53 *Lawful conduct in labor disputes.* (1) The following acts, whether performed singly or in concert, shall be legal:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment regardless of any promise, undertaking, contract or agreement in violation of the public policy declared in section 103.52;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103.52;

(c) Paying or giving to, any person any strike or unemployment benefits or insurance or other moneys or things of value;

(d) By all lawful means aiding any person who is being proceeded against in, or is prosecuting any action or suit in any court of the United States or of any state;

(e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof;

(f) Ceasing to patronize or to employ any person or persons, but nothing herein shall be construed to legalize a secondary boycott;

(g) Assembling peaceably to do or to organize to do any of the acts heretofore specified or to promote lawful interests;

(h) Advising or notifying any person or persons of an intention to do any of the acts heretofore specified;

(i) Agreeing with other persons to do or not to do any of the acts heretofore specified;

(j) Advising, urging, or inducing without fraud, violence, or threat thereof, others to do the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103.52; and

(k) Doing in concert any or all of the acts heretofore specified shall not constitute an unlawful combination or conspiracy;

(1) Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal.

(2) No court, nor any judge or judges thereof, shall have jurisdiction to issue any restraining order or temporary or permanent injunction which, in specific or general terms, prohibits any person or persons from doing, whether singly or in concert, any of the foregoing acts.

103.54 *Responsibility for unlawful acts.* No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute (as these terms are defined in section 103.62) shall be held responsible or liable in any civil action at law or suit in equity, or in any criminal prosecution, for the unlawful acts of individual officers, members, or agents, except upon proof by a preponderance of the evidence and without the aid of any presumptions of law or fact, both of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization, and (b) actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization.

103.55 *Public policy as to labor litigation.* In the interpretation and application of sections 103.56 to 103.59, the public policy of this state is declared to be:

Equity procedure that permits a complaining party to obtain sweeping injunctive relief that is not preceded by or conditioned upon notice to and hearing of the responding party or parties, or that issues after hearing based upon written affidavits alone and not wholly or in part upon examination, confrontation and cross-examination of witnesses in open court, is peculiarly subject to abuse in labor litigation for the reasons that

(1) The status quo cannot be maintained but is necessarily altered by the injunction;

(2) Determination of issues of veracity and of probability of fact from affidavits of the opposing parties that are contradictory and, under the circumstances, untrustworthy rather than from oral examination in open court is subject to grave error;

(3) Error in issuing the injunctive relief is usually irreparable to the opposing party; and

(4) Delay incident to the normal course of appellate practice frequently makes ultimate correction of error in law or in fact unavailing in the particular case.

103.56 *Injunctions: conditions of issuance; restraining orders.* (1) No court nor any judge or judges thereof shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in section 103.62, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of all the following facts by the court or judge or judges thereof:

(a) That unlawful acts have been threatened or committed and will be executed or continued unless restrained.

(b) That substantial and irreparable injury to complainant's property will follow unless the relief requested is granted;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial thereof than will be inflicted upon defendants by the granting thereof;

(d) That the relief to be granted does not violate the provisions of section 103.53;

(e) That complainant has no adequate remedy at law; and

(f) That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection.

(2) Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to those public officers charged with the duty to protect complainant's property. Provided, however, that if a complainant shall also allege that unless a temporary restraining order shall be issued before such hearing may be had, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be granted upon the expiration of such reasonable notice of application therefor as the court may direct by order to show cause, but in no case less than forty-eight hours.

(3) Such order to show cause shall be served upon such party or parties as are sought to be restrained and as shall be specified in said order, and then only upon testimony under oath, or in the discretion of the court, upon affidavits, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing as herein provided for.

(4) Such a temporary restraining order shall be effective for no longer than five days, and at the expiration of said five days shall become void and not subject to renewal or extension, provided, however, that if the hearing for a temporary injunction shall have been begun before the expiration of the said five days the restraining order may in the

court's discretion be continued until a decision is reached upon the issuance of the temporary injunction.

(5) No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

(6) The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

103.57 *Clean hands doctrine.* No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any legal obligation which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available machinery of governmental mediation or voluntary arbitration, but nothing herein contained shall be deemed to require the court to await the action of any such tribunal if irreparable injury is threatened.

103.58 *Injunctions: contents.* Except as provided in section 103.56, no restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction, and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and expressly included in said findings of fact made and filed by the court as provided herein; and shall be binding only upon the parties to the suit, their agents, servants, employes and attorneys, or those in active concert and participation with them, and who shall by personal service or otherwise have received actual notice of the same.

103.59 *Injunctions: appeals.* Whenever any court or judge or judges thereof shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings, and on his filing the usual bond for costs, forthwith certify the entire record of the case, including a transcript of the evidence taken, to the appropriate appellate court for its review. Upon the filing of such record in the appropriate appellate court the appeal shall be heard with the greatest possible expedition, giving the proceeding precedence over all other matters except older matters of the same character.

103.60 *Contempt cases.* In all cases where a person shall be charged with civil or criminal contempt for violation of a restraining order or injunction issued by a court or judge or judges thereof, the accused shall enjoy:

(1) The rights as to admission to bail that are accorded to persons accused of crime.

(2) The right to be notified of the accusation and a reasonable time to make a defense, provided the alleged contempt is not committed in the immediate view or presence of the court.

(3) Upon demand, the right to a speedy and public trial by an impartial jury of the county wherein the contempt shall have been committed, provided that this requirement shall not be construed to apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court. All contempt proceedings, whether civil or criminal, brought for the alleged violation of any such restraining order or injunction, are, and hereby are declared to be independent, original, special proceedings, and shall require a unanimous finding of the jury.

(4) The right to file with the court a demand for the retirement of the judge sitting in the proceeding, upon an affidavit of prejudice being filed as is now provided by law in other cases. Upon the filing of any such affidavit, the judge shall thereupon proceed no further, but another judge shall be designated as is now provided for in other cases. The affidavit shall be filed prior to the hearing in the contempt proceeding.

103.61 *Punishment for contempt.* Punishment for a contempt, specified in section 103.60, may be by fine, not exceeding twenty-five dollars, or by imprisonment not exceeding ten days, in the jail of the county where the court is sitting, or both, in the discretion of the court. Where a person is committed to jail, for the nonpayment of such a fine, he must be discharged at the expiration of fifteen days; but where he is also committed for a definite time, the fifteen

days must be computed from the expiration of the definite time.

103.62 *Definitions.* When used in sections 103.51 to 103.63, and for the purposes of these sections:

(1) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in a single industry, trade, craft, or occupation; or who are employes of one employer; or who are members of the same or an affiliated organization of employers or employes; whether such dispute is (1) between one or more employers or associations of employers and one or more employes or associations of employes; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employes or associations of employes and one or more employes or associations of employes; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in subsection (3) of "persons participating or interested" therein (as defined in subsection (2)).

(2) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the industry, trade, craft, or occupation in which such dispute occurs, or is a member, officer, or agent of any association of employers or employes engaged in such industry, trade, craft, or occupation.

(3) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employ-

ment relations, or any other controversy arising out of the respective interests of employer and employe, regardless of whether or not the disputants stand in the proximate relation of employer and employe.

103.63 *Severability of provisions.* If any provision of sections 103.51 to 103.63 or the applications thereof to any person or circumstance is held invalid, the remainder of these sections and the application of such provisions to other persons or circumstances shall not be affected thereby.

PERTINENT SECTIONS OF WISCONSIN CONSTITUTION

(Art. VII) *Judicial power.* Section 2. The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace. The legislature may also vest such jurisdiction as shall be deemed necessary in municipal courts, and shall have power to establish inferior courts in the several counties, with limited civil and criminal jurisdiction. Provided, that the jurisdiction which may be vested in municipal courts shall not exceed in their respective municipalities that of circuit courts in their respective circuits as prescribed in this constitution; and that the legislature shall provide as well for the election of judges of the municipal courts as of the judges of inferior courts, by the qualified electors of the respective jurisdictions. The term of office of the judges of the said municipal and inferior courts shall not be longer than that of the judges of the circuit courts.

(Art. VII) *Supreme court, jurisdiction.* Section 3. The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state; but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same.

(Art. VII) *Circuit court, jurisdiction.* Section 8. The circuit courts shall have original jurisdiction in all matters civil and criminal within this state, not excepted in this constitution, and not hereafter prohibited by law; and appellate jurisdiction from all inferior courts and tribunals, and a super-

visory control over the same. They shall also have the power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and all other writs necessary to carry into effect their orders, judgments and decrees, and give them a general control over inferior courts and jurisdictions.

(*The foregoing constitutional provisions will be found printed in the Wisconsin Statutes of* 1935 *at pp.* 42-44.)

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SUPREME COURT OF THE UNITED STATES

October Term, 1936.

No. 658

PAUL SENN, APPELLANT,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5, CHARLES SCHREIBER, ET AL.

Appeal from the Supreme Court of the State of Wisconsin

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

LEON B. LAMFROM,
Counsel for Appellant.

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SCOPE OF THIS BRIEF

After appellant's brief had been served upon counsel for the appellees, appellant's counsel was served with appellees' motion to dismiss and their brief in support thereof. It is the purpose of this brief to reply thereto. Inasmuch as appellees' brief in support of their motion to dismiss involves, for the most part, a consideration of the merits which we cover in our brief on the merits, this brief is merely supplemental to our brief on the merits.

We shall here consider the points raised by appellees, in their brief in support of the motion to dismiss, in the order in which they are raised.

MATERIAL FACTS

The contract (Plaintiff's Exhibit 1, R. 112), which appellees demanded that the appellant sign, was submitted to him for his signature in March, 1935. The material clause of this contract was:

> "ARTICLE III. It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper but that the installation of all materials claimed by the party of the second part as listed under the caption 'CLASSIFICATION OF WORK' in this agreement, shall be done by journeymen members of Tile Layers Protective Union Local No. 5." (R. 113)

Appellant was agreeable to entering into this contract provided only that said Article III was changed so that he would not be deprived of the right to work in his own business with his own hands (R. 40, 58-59, 78).

In appellees' brief, reference is made to contacts which existed between the appellant and the appellees prior to the time that the contract (Plaintiff's Exhibit 1, R. 112) was left with the appellant and the appellees demanded appellant's signature thereto. Apparently, this reference to such contact relations between the appellant and the appellees prior to March, 1935, is made for the purpose of showing that the picketing and related activities engaged in by the appellees, which appellant seeks to have restrained, were engaged in because of some dispute other or further than the dispute over the appellant's refusal to sign the contract unless it was amended to enable him to work in his own business with his hands.

The record in this case shows that the sole dispute which existed between the appellant and the appellees, at the time that the picketing and related activities commenced against him, was concerning appellant's refusal to sign the contract unless it be amended so as not to deprive him of the right to work in his own business. This appears from the following testimony of Charles Schreiber, the Business Agent of one of the appellees, Tile Layers Protective Union:

"Q. Now, what would you require of Mr. Senn to do today in order that you give up picketing his home and from picketing the jobs he works on?

"A. Sign this agreement." (R. 43)

This is also borne out by the statement of counsel for the appellees at the trial:

"Mr. Padway (counsel for appellees): He (Senn) is willing to do everything we ask of him but the one thing, 'I won't abstain, or promise to abstain from working with the tools of the trade at tile setting'." (R. 67)

The trial court found as a fact that the picketing and related activities were engaged in by the appellees because of the refusal of the appellant to sign the contract with the provision therein that he desist from working in his own business with his hands (Findings of Fact Nos. 9 and 10, R. 26-27).

In appellees' brief, inferentially at least, it is made to appear that the contract, which they demanded that the appellant sign, contained the clause prohibiting him from working in his own business with his own hands *because he was not qualified to do the work.* There was no finding made by the trial court and no determination by the appellate court that appellant was not qualified to do the work which he theretofore had done in his business and which he desired

to continue to do in his business. On the contrary, the evidence clearly establishes the fact that he was fully experienced and capable of doing the work (R. 50, 64-65, 81-82, 83, 99-100). Regardless, however, of whether appellant was qualified to do the work, it appears that the requirement in the contract that the appellant agree not to work in his own business with his hands was not personal to the appellant. On the contrary, it appears that this provision disqualifying an employer from working in his own business with his hands was a provision required of all employers in the business (R. 32, 67, 84) and the trial court so found (Finding of Fact No. 15, R. 28).

ARGUMENT

Point I

Under this point, appellees contend that the Wisconsin Labor Code does not involve the Fourteenth Amendment and that the Federal question involved is no longer a substantial one.

Speaking of the majority opinion of the Supreme Court of Wisconsin in the case at bar, the minority opinion stated:

> "The practice upheld by the court is Un-American, oppressive and intolerable. It is contrary to the concept that I have always had of the fundamental and inalienable rights of the individual citizen secured to him by the constitution of the United States. I cannot see that concept held for naught by this court without protest. And I will not yield that concept until it is declared erroneous by the final arbiter of that constitution. My concept of the inherent rights of man under the constitution may be merely an ideal that I may eventually have to give up, but I am still strong in my faith in it; and I will ever cherish it unless it shall be destroyed by the ultimate authority, the Supreme Court of the United States.
>
> "The defendants' claim that absence of due process in their depriving the plaintiff of his property and his liberty is avoided by the provision of the code

declaring peaceful picketing lawful and because, as they say, the plaintiff is free to work with his hands and tools upon his jobs if he wants to." (R. 127)

"As to the peaceful picketing declared lawful by the code, whether or not it may be declared lawful in furtherance of a strike of employees, it passes the bounds of reasonableness to say it may be used to coerce one into refraining from working with his hands and the tools of his trade or following his chosen calling or making contracts in the prosecution of his business." (R. 128)

"Whether it (picketing) is lawful or not depends upon the instant situation involved.

" 'The legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the XIVth Amendment is intended to preserve'."

"Truax Case, supra."
(R. 130)

The question squarely raised and considered in this case is—Is the Wisconsin Labor Code, construed by the Supreme Court of Wisconsin as legalizing picketing and related activities engaged in by appellees for the sole purpose of forcing appellant to give up his right to work in his own business with his hands, constitutional and valid under Section 1 of the Fourteenth Amendment to the United States Constitution.

It appears that appellees' position, as expressed in their brief, is that the Wisconsin Labor Code does not contravene the Fourteenth Amendment to the United States Constitution on the ground that the Wisconsin Labor Code was within the legitimate exercise of the police power in limiting equitable relief by way of injunction. Counsel states in this connection that "the limitation of this equitable relief is not meant to be nor is it declared to be an adjudication of the rights of appellant in an action at law for damages (Appellees' Brief on Jurisdiction, page 12).

It appears that counsel has overlooked the fact that under Section 103.56 of the Wisconsin Labor Code, it is only conduct *which is declared to be lawful* under Section 103.53 of the Wisconsin Labor Code which cannot be restrained. It is only by reason of the fact that the Supreme Court of Wisconsin held that the conduct of the appellees in the case at bar *was lawful* under the Wisconsin Labor Code that relief was denied the appellant. In the respect that the Wisconsin Labor Code provides that conduct therein described, engaged in in the course of labor disputes, is lawful, it differs from the Norris-La Guardia Act, 29 U.S.C.A. Sections 101 to 115, referred to in appellees' brief. The Norris-La Guardia Act merely limits the jurisdiction of inferior Federal courts to issue injunctions in cases involving labor disputes. It contains no provisions similar to those contained in Section 103.53 of the Wisconsin Labor Code, defining "lawful conduct in labor disputes." The provisions declaring what conduct is lawful in "labor disputes" are peculiar to the Wisconsin Labor Code. (Sec. 104, the pertinent section, of the Norris-La Guardia Act will be found in the Appendix hereto at p. 23-24.

The Wisconsin Labor Code, in so far as it, as construed by the Supreme Court of Wisconsin in the case at bar, makes the conduct of the appellees lawful, effectually denies appellant not only equitable relief but denies him any relief whatsoever by damages at law. It is axiomatic, of course, that no damages can be recovered as against conduct which is lawful.

The cases cited by counsel involving the Norris-La Guardia Act are not in point for two reasons: *First,* the Norris-La Guardia Act involves the consideration of the power of Congress to limit the equity jurisdiction of inferior Federal courts, and, *second,* they do not involve the question as to the validity of picketing and related activities *engaged in*

for the purpose of forcing an employer to give up his right to work in his own business with his hands.

Similarly, the other cases cited by counsel are not pertinent or applicable to the consideration of the validity of the Wisconsin Labor Code as applied to the conduct of the appellees in the case at bar. None of the cases cited involved picketing or related activities *to force an employer to give up his right to work in his own business.*

Counsel cites cases bearing on the point that a state legislature may prescribe procedural regulations in given situations. Manifestly, those cases are not in point inasmuch as we are here concerned, not with the question of procedure, but the *denial of a remedy.*

What we have heretofore stated concerning the Norris-La Guardia Act applies equally to Section 20 of the Clayton Act (38 U. S. Stats. at Large, 730, Ch. 323), referred to by counsel, and the cases cited by counsel involving said Act.

In *Truax v. Corrigan,* 257 U. S. 312, 340, 66 L. Ed. 254, this court disposed of the argument that if it held the Arizona law invalid under the Fourteenth Amendment it would in effect hold invalid Section 20 of the Clayton Act, as follows:

> "It is urged that, in holding Chap. 1464 invalid, we are in effect holding invalid Sec. 20 of the Clayton Act (38 Stat. at L. 738, chap. 323, Comp. Stat. sec. 1243d, 6 Fed. Stat. Anno. 2d ed. p. 141). Of course, we are not doing so. In the first place, the equality clause of the 14th Amendment does not apply to congressional but only to state action. In the second place, Sec. 20 of the Clayton Act never has been construed or applied as the supreme court of Arizona has construed and applied Chap. 1464 in this case."

Counsel devotes a considerable portion of his brief to the point that the Supreme Court of Wisconsin properly construed the Wisconsin Labor Code as legalizing the ac-

tivities of the appellees in the case at bar. No attempt has been made or is now being made to attack the construction. It has been our position and is now our position that the Wisconsin Labor Code, as construed by the Supreme Court of Wisconsin, is invalid if it denies appellant relief against the activities of the appellees when the picketing and related activities are *in furtherance of a conspiracy to force the appellant to give up his right to work in his own business.* But for the fact that the Wisconsin Supreme Court construed the Wisconsin Labor Code as making appellees' conduct lawful, we would not be here contending that the appellant was deprived of property without due process and denied the equal protection of the laws under the Fourteenth Amendment to the United States Constitution. It is the Wisconsin Labor Code, as construed by the Supreme Court of Wisconsin and *as applied to the facts in the case at bar,* which we assert deprives appellant of property without due process and denies him the equal protection of the laws.

Counsel contends that *Truax v. Corrigan,* 257 U. S. 312, 66 L. Ed. 254, and *Coppage v. Kansas,* 236 U. S. 1, 59 L. Ed. 441, relied upon by the appellant and referred to in appellant's brief on the merits, are not in point on the ground that in those cases the acts under consideration were tortious and that the activities of the appellees in the case at bar were not tortious. In reply to this we say, as did the minority opinion in the case at bar:

> "The defendants claim that absence of due process in their depriving the plaintiff of his property and his liberty is avoided by the provision of the code declaring peaceful picketing lawful and because, as they say, the plaintiff is free to work with his hands and tools upon his jobs if he wants to. As to the latter, the plaintiff is no more free so to work in the face of the threat of destruction of his business and deprivation of his means of livelihood by continued and in-

cessant picketing than he would be in the face of a threat to 'beat him up' every time he took a contract for tiling. In the latter case he could make his contract and take his beating, if he wanted to, but it is quite apparent that he would not want to, and would refrain from subjecting himself to the threatened beating. A labor union may not use its power to such ends and with such effect." (R. 127)

"The only provision of the proposed contract to which he (appellant) will not accede is the one denying him the right to labor with his own hands and tools upon the jobs he contracts to perform. He has not sufficient capital to enable him to take any but small jobs. Such jobs as he can handle will yield no profit unless he works upon them himself. He cannot make a living at laying tile as a journeyman without membership in the defendant union, and that is denied him because he has not served three years as apprentice to a journeyman tile layer, and without such membership he cannot procure sufficient employment as a journeyman. To picket his jobs will injure his business as a contractor and reduce his earnings below sufficiency for support of himself and family. Destruction of plaintiff's business through picketing is the object of the defendants and is likely to be attained if the picketing be continued. * * * The requirement that no contractor shall work with his own hands and his own tools upon a job would foreclose every worker, union as well as non-union, from entering the contracting business unless he has or is able to procure capital otherwise not necessary for entry into and prosecution of the business to success. I cannot believe that such result is made lawful by the claim that it is nothing but economic pressure applied to the furtherance of the cause of workers as a whole or of that class of workers belonging to labor unions." (R. 126-127)

The avowed object and purpose of the appellees in engaging in the picketing and related activities against the appellant was to force him, against his will, to agree not to work in his own business with his hands and tools (R. 43, 67).

We submit that when counsel states (Appellees' Brief on Jurisdiction p. 24) that the only tortious acts involved in the case at bar consisted of the proposed secondary boycott which the appellees, through their counsel, agreed to withdraw, he is begging the question. It is our position, as we point out in our brief on the merits, that the right of an individual to work in his own business is an inalienable right which is protected by Section 1 of the Fourteenth Amendment to the United States Constitution, and that any statute permitting a concert of activity designed to harrass, injure and interfere with an individual for the purpose of forcing him *to give up his right to work in his own business* is in contravention of the guarantees afforded by the Fourteenth Amendment to the United States Constitution. If such right of an individual is, as we assert, protected by the Fourteenth Amendment to the United States Constitution, any such interference with that right must of necessity be tortious. If a statute permitting picketing and related activities by labor unions representing none of an employer's employees, carried on for the purpose of compelling an employer to give up his right to work in his own business, contravenes the Fourteenth Amendment to the United States Constitution *because such acts cannot be made lawful,* such acts must of necessity be tortious *per se.*

Concert of action is a conspiracy and tortious if its object is unlawful, though the acts committed in connection therewith are otherwise lawful.

Pettibone v. United States, 148 U. S. 197, 203, 37 L. Ed. 419;

Duplex Printing Press Co. v. Deering, 254 U. S. 443, 467, 65 L. Ed. 349;

Truax v. Corrigan, 257 U. S. 312, 327, 66 L. Ed. 254.

In the case at bar, the appellant was harrassed, followed on the streets, picketed and bannered with signs holding out to the public that he was *unfair* to the Tile Layers Protective Union and should not be patronized (R. 41), despite the fact that he was willing to accede to all of its demands excepting only the demand that he agree not to work in his own business with his hands and tools (R. 59, 67).

We do not challenge the right of labor to organize and employ its recognized powers to further its legitimate interests. We do assert, however, that the concert of activities of the appellees and the picketing and related activities of the appellees directed against Senn are unlawful, *because their object is to force Senn to agree to give up a right protected by the Federal Constitution—the right to work with his hands in his own business.*

The following excerpt from *Gompers v. Buck's Stove & R. Co.*, 221 U. S. 418, 439, 55 L. Ed. 797, is in point here:

> "Society itself is an organization, and does not object to organizations for social, religious, business, and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virtue of this right, powerful labor unions have been organized.
>
> "But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. *This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventive powers of a court of equity. When such appeal is made, it is the duty of government*

to protect the one against the many, as well as the many against the one. (italics ours)

> "In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published gives the words 'Unfair,' 'We Don't Patronize,' or similar expressions, a force not inhering in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged."

That so-called "peaceful persuasion" may nevertheless be unlawful if the object thereof is to force an individual, as stated in the *Gompers* case, to sacrifice rights protected by the Constitution, is also pointed out in *Duplex Printing Press Co. v. Deering,* 254 U. S. 443, 467, 65 L. Ed. 349, where this court said:

> "It is settled by these decisions that such a restraint produced by peaceable persuasion is as much within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute."

In the foregoing statement, this court referred to the fact that activities of the defendants in the *Duplex* case impaired the right of the plaintiff to engage in interstate commerce contrary to the provisions of the Sherman Act and consequently were illegal. The impairment involved in the case at bar, we submit, is of a far more serious nature. The object of the conspiracy here involved is to force Senn to relinquish his right to do any work at all in his own business with his hands and tools. The distinction between the case at bar and the *Duplex* case is that the right invaded

here is a *constitutional* right, while the right invaded in the *Duplex* case was a right created by statute.

Answering further counsel's contention that the acts of the appellees were not tortious *per se*:

But for the fact that the trial court found that a labor dispute existed between the appellant and the appellees within the meaning of the Wisconsin Labor Code (Conclusion of Law No. 1, R. 29), appellees would have been guilty of a criminal conspiracy within the meaning of Section 343.681 of the Wisconsin Statutes of 1935, which was held constitutional by this court in *Aikens v. Wisconsin*, 195 U. S. 194, 49 L. Ed. 154. Said section provides:

> "*Injury to business; restraint of will.* Any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars."

This conclusion of the trial court was affirmed by the Supreme Court of the State of Wisconsin in the case at bar. See also companion case, *American Furniture Company v. I. B. of T. C. and H. of A*, etc., 268 N. W. 250, the decision in which was handed down at the same time as the decision in the case at bar.

Counsel has cited a number of cases bearing on the academic question of the right of Congress to limit the jurisdiction of inferior Federal courts and the power of the state courts to regulate the procedure in state courts. Not one of the cases cited either directly or indirectly uphold the

validity of an act which makes it lawful to picket an employer and brand him as "unfair" when the sole object of the picketing is to compel the employer to give up his right to work in his own business.

As we point out in our brief on the merits, on the other hand, there is ample authority that any statute which makes it lawful to picket and banner an employer as unfair to a union merely because he refuses to give up his inalienable right to work in his own business violates the "due process" and "equal protection" clause of the Fourteenth Amendment to the United States Constitution.

In addition to what we have here said concerning the object of the activities engaged in by the appellees, we have the further fact that none of the appellees were employees of appellant, represented any of his employees, or were under privity of relationship with the appellant. Inasmuch as this point has been considered at some length in our brief on the merits, we shall not refer to it further in this brief, excepting that we would like to add to what we have there said that but for the Wisconsin Labor Code, as construed by the Supreme Court of the State of Wisconsin in the case at bar and the companion case of *American Furniture Company v. I. B. of T. C. and H. of A.*, etc., 268 N. W. 250, picketing and related activities engaged in by labor unions who represented none of an employer's employees would have been restrained.

Duplex Printing Press Co. v. Deering, 254 U. S. 443, 65 L. Ed. 349, 41 S. Ct. R. 172, 16 A. L. R. 172, 207;

American Steel Foundries Co. v. Tri-City C. T. Council, 257 U. S. 184, 66 L. Ed. 189, 42 S. Ct. R. 72, 27 A. L. R. 360, 369;

Ferguson v. Peake, 18 F. (2d) 166, 167 (Ct. of App. D. C.);

Waitresses Union v. Benish Restaurant Co., 6 F. (2d) 568 (C. C. A. 8th Cir.);

Montgomery v. Pacific Electric Co., 293 Fed. 680;

Quinlivan v. Dail-Overland Co., 274 Fed. 56, 65 (C. C. A. 6th Cir.);

Dail-Overland Co. v. Willys-Overland, Inc., 263 Fed. 171;

Gevas v. Greek Restaurant Workers Club, 134 A. (N. J.) 309;

Blakely Laundry Co. v. Cleaners etc. Union, 169 A. (N. J.) 541;

Harvey v. Chapman, 115 N. E. (Mass.) 304, 305;

M. Steinert & Sons Co. v. Tagen, 93 N. E. (Mass.) 584, 585.

In the case of *American Steel Foundries v. Tri-City C. T. Council*, 257 U. S. 184, 202, 66 L. Ed. 189, 42 S. Ct. R. 72, 27 A. L. R. 360, 369, this court enunciated the principle as follows:

> "It has been determined by this court that • • • the second paragraph (of sec. 20 of the Clayton Act) applies only in cases growing out of a dispute concerning terms or conditions of employment between an employer and employee, between employers and employees, or between employees, or between persons employed and persons seeking employment, *and not to such a dispute between an employer and persons who are neither ex-employees nor seeking employment.* Duplex Printing Press Co. vs. Deering, 254 U. S. 443, 65 L. Ed. 349, 16 A. L. R. 196, 41 Sup. Ct. Rep. 172. *Only two of the defendants, Cook and Churchill, who left at the time of the strike, can invoke in their behalf sec. 20.*" (italics ours)

It is our position that the Wisconsin Labor Code, as construed by the Supreme Court of the State of Wisconsin, violates the Fourteenth Amendment in the respects heretofore stated for two reasons, taken either in combination or independently of each other: *First,* to the extent that it denies a remedy against picketing and related activities, the object of which is to force an employer not to work in his own business, regardless of the status of the parties picketing the employer; and, *second,* to the extent that it permits picketing and related activities by labor unions or others representing none of the employer's employees.

Point II

Under this point, appellees contend that the findings of the trial and appellate courts as to the purposes and reasonableness of the demand are findings of fact; that such findings are not reviewable by this court; and that under such findings of fact, no Federal right has been denied to the appellant.

Counsel has apparently overlooked the fact that in cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongfully denied, and in which the state court has put its decision on a finding that the Federal right asserted has no basis, this court, as an incident of its power to determine whether a Federal right has been wrongfully denied, may go behind the finding to see whether it is without substantial support.

> *Kansas City Southern R. Co. v. H. Albers Commission Co.,* 223 U. S. 573, 591, 593, 56 L. Ed. 556, 565, 566;
>
> *Cedar Rapids Gaslight Co. v. Cedar Rapids,* 223 U. S. 655, 668, 669, 56 L. Ed. 594, 604;

Southern P. Co. v. Schuyler, 227 U. S. 601, 611, 57 L. Ed. 662, 669;

Truax v. Corrigan, 257 U. S. 312, 324, 66 L. Ed. 254, 259.

It is significant to note that no finding of fact or conclusion of law was made by the trial court nor was any statement made by the appellate court in the case at bar to the effect that the Wisconsin Labor Code, as construed by the court, was in the furtherance of the best interests of the general public and that the public welfare was promoted thereby. On the contrary, the sole and only finding and conclusion of law by the trial court and the only statement made by the appellate court was that the demand made by the appellees that the appellant agree not to work in his own business was reasonably for the protection of the appellees as workers and craftsmen in the industry (Conclusion of Law No. 5, R. 29, and majority opinion R. 121). Significant in this connection is the following statement in the minority opinion in the case at bar:

> "And as I understand the welfare requirement, the welfare served must be that of the public, not that of a particular class of the public to the detriment of another class of the public. To rule that peaceful picketing in every case is lawful, would serve the interest of organized labor to the detriment of unorganized labor and not induce to the welfare of the public as a whole • • • To justify statutes affecting one class of the society to the detriment of another class, if there can be any such justification, the advantage to the one class must at least so overbalance the disadvantages to the other that the welfare of the public as a whole is thereby advanced. The instant statute, if applied to the situation here involved, in my opinion does not meet these tests." (R. 130)

Counsel states (Appellees' Brief on Jurisdiction p. 33) that, "If the purposes are directed towards improvement of

working conditions, then the peaceful activities are lawful, and the resultant hardships, if any, to the employer become damnum absque injuria." If this is true, the countless cases bearing upon the limitation on the exercise of the police power by state legislatures, which lay down the well-known rule that the police power must be exercised for the public benefit and welfare and not for the purpose of benefitting one class at the expense of another, are completely overthrown and have merely historical value. If this is true, the "due process" and "equal protection" clauses of the Fourteenth Amendment become more innocuous verbiage. Fortunately, however, the supreme law of the land is still the Constitution of the United States and the guarantees against deprivation of property without due process and denial of the equal protection of the laws still protect individuals in their right to work with his hands in his own business.

The sole question in this case is whether or not the Wisconsin Labor Code, under the admitted facts, can, in face of the Fourteenth Amendment, legalize picketing and related activities, the object and purpose of which is to force an employer to give up his right to work in his own business, particularly when those activities are engaged in by labor unions representing none of the employer's employees. We submit that the question as to whether or not the Wisconsin Labor Code can legalize such activities, involving, as it does, rights protected to him by the Fourteenth Amendment to the United States Constitution, is a matter for this court to determine for itself. This court never has, and, we respectfully submit, as long as the Fourteenth Amendment remains in the United States Constitution never will, countenance interference by any organized group with the right of an individual to work in his own business *merely*

because the best interests of the group would be advanced if they succeeded in stopping him from working in his own business.

What we have said here is to be supplemented by what we have said in our brief on the merits.

Point III

Under this point, counsel asserts that the demand upon the appellant that he agree not to work in his own business with his hands and tools was justified because of the union rules and regulations, and that the union rules and regulations are not within the jurisdiction of this court for the purpose of review.

In answer to what is covered under this point in Appellees' Brief on Jurisdiction, permit us to state that we have not challenged and are not here challenging any of the rules or regulations of the appellee unions. We agree with counsel that the rules and regulations of the appellee unions are not before this court for review. The sole question before this court is whether or not the Wisconsin Labor Code, in so far as it denies a remedy against picketing and related activities by labor unions, the object and purpose of which is to force an employer to agree not to work in his own business with his hands and tools, violates the Fourteenth Amendment to the United States Constitution.

Whether the demand made upon the appellant that he agree not to work in his own busines was made in pursuance of union rules is quite beside the point. The fact is that a demand was made upon the appellant to agree not to work in his own business, and the further fact is that the picketing and related activities engaged in by the appellees were not restrained solely and only because of the determination of the trial and appellate courts that such activ-

ities were made lawful for said object and purpose by the Wisconsin Labor Code.

CONCLUSION

We state, as did the minority opinion in the case at bar (R. 125):

> "As quoted in Cameron v. International Alliance T. S. E., 118 N. J. Eq. 11, 176 Atl. 692:
>
> "'There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more or less than the sacred right of labor.'
>
> "'The right of a workman to the "free use of his hands" has been described as one "of which the legislature cannot deprive him, one which the law of no trades union can take from him, and one which it is the bounden duty of the courts to protect." "A man may not barter away his life or his freedom or his substantial rights." Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365.'
>
> "These statements imply that the right to labor with one's own hands when one will and as he will, the right to follow a chosen occupation or business, the right to earn one's own living, and the right to contract are so sacred, so valuable, so important to the individual, that no one may be coerced into giving them up, and when as here the means of coercing their surrender results in irreparable injury to the individual, the coercion should upon established principles of equity be enjoined. We are not here concerned with licensing restrictions or the like imposed under the police power for the protection of the public. We need only consider the facts of the instant case to perceive the denial and deprivation of liberty of the plaintiff and I perceive no 'due process' by which the result is produced."

The following cases, cited in our brief on the merits, amply sustain our position that, inasmuch as the Wisconsin Labor Code denies appellant a remedy in the case at bar, it violates the "due process" and "equal protection of the law" clauses of the Fourteenth Amendment to the United

States Constitution:

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254;

Coppage v. Kansas, 236 U. S. 1, 59 L. Ed. 441;

Butchers' Union Slaughter-House and Live Stock Landing Company vs. Crescent City Live Stock Landing and Slaughter-House Company, 111 U. S. 746, 28 L. Ed. 585;

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. Ed. 260;

Adair v. United States, 208 U. S. 161, 52 L. Ed. 436;
Allgeyer v. Louisiana, 165 U. S. 578, 41 L. Ed. 832, 17 S. Ct. 427;

Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131;
In re Opinion of the Justices, 86 N. H. 597, 166 Atl. 640;

In re Opinion of the Justices, 211 Mass. 618, 98 N. E. 337.

We respectfully request that the motion for dismissal be denied.

Respectfully submitted,

LEON B. LAMFROM,

Counsel for Appellant.

APPENDIX

Section 104, Norris-La Guardia Act, 29 U.S.C.A. Sections 101 to 115.

Sec. 104. *Enumeration of specific acts not subject to restraining orders or injunctions.* No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this chapter;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this chapter. (Mar. 23, 1932, c. 90, S. 4, 47 Stat. 70.)

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SUPREME COURT OF THE UNITED STATES

October Term, 1936.

No. 658

PAUL SENN, APPELLANT,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL No. 5, CHARLES SCHREIBER, ET AL.

Appeal from the Supreme Court of the State of Wisconsin

BRIEF OF APPELLANT IN REPLY TO BRIEF OF RESPONDENTS AND BRIEF OF AMICI CURIAE

LEON B. LAMFROM,

Counsel for Appellant.

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TILE LAYERS PROTECTIVE UNION, LOCAL No. 5, CHARLES SCHREIBER, ET AL.

Appeal from the Supreme Court of the State of Wisconsin

APPELLANT'S REPLY BRIEF

SCOPE OF THIS BRIEF

It is the purpose of this brief to make a short reply to the "Brief of Respondents" and under Part II of this brief to make a short reply to the brief filed by the American Civil Liberties Union and International Juridical Association, *amici curiae*.

PART I

REPLY TO RESPONDENTS' BRIEF

Material Facts

In the "Brief of Respondents" (pp. 2-9), reference is made to the relations between the appellant and the appellees

prior to the time that the contract (Plaintiff's Exhibit 1, R. 112) was left with the appellant and the appellees demanded his signature thereto. Apparently, the reference to the relations which existed between the appellant and the appellees prior to said time is made for the purpose of showing that the picketing and related activities engaged in by the appellees were engaged in because of some dispute other or further than the dispute over the appellant's refusal to sign the contract unless it was amended to enable him to work with his hands in his own business.

As we point out on pages 3-5 in "Appellant's Brief in Opposition to Appellees' Motion to Dismiss," the sole dispute which existed between the appellant and the appellees at the time that the appellees started to picket him and during the trial of the case at bar was concerning appellant's refusal to sign the contract unless it was amended so as not to deprive him of the right to work with his hands in his own business (R. 26-27, 43, 67).

In appellees' brief, inferentially at least, it is made to appear that the contract, which they demanded that the appellant sign, contained the clause prohibiting him from working with his hands in his business *because he was not qualified to do the work*. There was no finding made by the trial court and no determination by the appellate court that the appellant was not qualified to do the work. On the contrary, the evidence clearly establishes the fact that he was fully qualified (R. 50, 64-65, 81-82, 83, 99-100). Senn's qualifications were not in issue. The clause in the contract, requiring him to give up his right to work with his hands in his own business, was a requirement of the appellees imposed upon all employers in the business (R. 32, 67, 84), and the trial court so found (Finding of Fact No. 15, R. 28).

Preliminary Statement

Under this heading, counsel states (Respondent's Brief, p. 12) that since the adoption of the Norris-La Guardia Act, the Legislatures of seventeen states have enacted similar or identical legislation with respect to state courts. As we point out in "Appellant's Brief in Opposition to Appellee's Motion to Dismiss" (p. 7), in the respect that the Wisconsin Labor Code (in Section 103.53) provides that conduct therein described, engaged in in the course of labor disputes, is lawful, it differs from the Norris-La Guardia Act. The Norris-La Guardia Act and the statutes of those states which are patterned after it merely limit the jurisdiction of the courts in the issuance of injunctions in cases involving labor disputes. They contain no provisions similar to those contained in Section 103.53 of the Wisconsin Labor Code, defining "lawful conduct in labor disputes."

None of the cases cited by counsel at pp. 13 and 14 of his brief presented the constitutional questions here involved.

Argument

At pages 16-19 of the Brief of Respondents, the contention is made that, because of appellant's refusal to agree not to work with his hands in his own business, it is their right to classify him as a non-union contractor and to picket him and advertise the fact that he is unfair. In support of his contention, *Exchange Bakery & Restaurant v. Rifkin*, 245 N. Y. 260, is cited. Among other reasons clearly apparent upon reading this case, it will be found not to be in point for the reason that it did not involve any demand upon an employer to give up his right to work with his hands in his own business.

At pp. 19-21 of the Brief of Respondents, the contention is made that it is as much the right of the respondents to appeal

to the public not to patronize Senn and to inform the public that he is a non-union contractor as it is his right to continue to work in his business with his hands. The answer to this is, in the words of the minority opinion (R. 127):

> "The plaintiff is no more free so to work in the face of the threat of destruction of his business and deprivation of his means of livelihood by continued and incessant picketing than he would be in the face of a threat to 'beat him up' every time he took a contract for tiling. In the latter case he could make his contract and take his beating, if he wanted to, but it is quite apparent that he would not want to, and would refrain from subjecting himself to the threatened beating. A labor union may not use its power to such ends and with such effect.

In support of this statement, *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 439, 55 L. Ed. 797, is cited, and the following language of this court in said case is referred to:

> "'The law, therefore, recognizes the right of the workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virtue of this right, powerful labor unions have been organized.
>
> "'But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventitive powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one.'" (R. 127-128)

In the case at bar, the appellant was harrassed, followed on the streets, picketed and bannered with signs holding out to the public that he was *unfair* to the Tile Layers Protective Union and should not be patronized. The statements of the

unions that Senn was unfair are truthful only if it is "unfair" for an employer to refuse to give up his right to work with his hands in his own business. Senn was perfectly willing to agree to all of the demands of the union covering wages, hours and working conditions. However, when the union coupled the aforementioned demands with an additional demand that Senn lay down his tools and do no work in the performance of his contracts, Senn refused to submit to that; and it is that refusal and none other which called into being the so-called economic pressure exerted against him by the unions. Holding Senn out as being unfair when he was willing to sign a closed shop union contract with the unions and agree to all of their demands, excepting the single demand that he give up his right to work with his hands in his business, is, we submit, a rather violent misuse of the term "unfair."

It is our position that no statute can, consistent with the Fourteenth Amendment to the Federal Constitution, empower a union to brand an employer as being unfair to organized labor and picket him merely because he refuses to give up his right to work with his hands in his own business.

Counsel states (Respondents' Brief, p. 20):

> "If the fact that appellant has the right to do a certain thing renders illegal the demand that he do otherwise, then the respondents cannot have a labor dispute respecting any demand which the appellant has a right to refuse."

It is our position that the *demand* that an employer give up his right to work in his own business is illegal, not because the employer has the right to work in his own business, but because of the fact that *the unions had no right to demand that the employer give up that right*. For example, we do not here question the right of labor unions representing employees to make a demand upon an employer on be-

half of the employees they represent covering wages, hours and working conditions. It is quite a different thing, however, when labor unions representing none of an employer's employees demand of the employer that he give up his right to work with his hands in his own business—a demand that *employees* could not legally make upon their employer.

It is significant to note in this connection that the demand upon Senn to give up his right to work with his hands in his own business was unconditional. No attempt was made to restrict the number of hours which he could work or to impose any limitations upon his right to work which had any relationship to the hours and working conditions of his employees.

At pages 21-30 of the Brief of Respondents, the point is made that unions have an interest in securing work for their members in competition with others and that they may "exert lawful economic pressure to displace non-union men with union men." In the case at bar, the unions asked Senn to displace his non-union *employees* with union employees and he was willing to accede to this demand. We have found no case, and counsel has cited none, which holds that unions have the right to "exert lawful economic pressure to displace" an *employer* in his own shop. On the other hand, as we point out in our main brief, all the cases that have passed on this point have held that such "economic pressure" cannot be exerted for such purpose.

A case apparently greatly relied upon by counsel is the case of *Zoat (Zaat) v. Building Trades Council,* 172 Wash. 445, 20 Pac. (2d) 589, cited at page 26 of his brief. An examination of this case will show that it is clearly not in point for the following reasons, among others:

1. No question under the Fourteenth Amendment to the Federal Constitution was involved.

2. There was no picketing engaged in or any application to have any picketing, actual or threatened, restrained.

3. The case went off on a demurrer and apparently the court sustained the demurrer on the ground that the elements of damage were not properly pleaded and that a mere general allegation that the plaintiff has sustained damage in the sum of $1,000.00 was not sufficient under the Washington law.

Whether or not the union represented any of the employer's employees does not appear.

On pages 27-30 of the Respondent's Brief, the argument is made that a contractor working with the tools of the trade may underbid those who do not do so and so affect respondents to their detriment. It is stated in this connection (Respondents' Brief p. 28) that the employer may work Sundays, all hours he pleases, and figure his own personal labor at a much lower scale than that paid to the union and is able to underbid contractors who agree with the union not to work with the tools of the trade in the business.

The answer to that argument is this: There is nothing to stop a contractor from doing all Senn can do, namely to work with his hands in his own business, unless the union has caused the employer to give up this right by contract with the union. The advantage that Senn may have over other contractors, if any, of which the unions complain, is thus *of the union's own creation*. As we heretofore point out, there was no demand or attempt made to regulate Senn's hours. On the contrary, the unions said to Senn, in effect: "You are disqualified from working because you are an employer. As an employer you cannot work with your hands *at any time* and *under no conditions*. We are not satisfied to limit your hours or impose certain restrictions on your right to work in your business. We are telling you that

you can't work at all!" In this connection, it is significant to note that Senn advised the business agent of the tile setters union, Mr. Schreiber, that he was willing "to agree to employ union setters and union helpers on each job, regardless (of) size, but reserved the right to work with those men, *during their working hours.*" (Italics ours) (R. 35).

Counsel states, at pages 31-36 of his brief, that the demand upon Senn that he agree not to work with his hands in his business was reasonable so that an employer could not circumvent the requirement as to the employment of union men by going into partnership with those working with him. If this contention has any merit at all, which we contend it has not, and it was the desire of the unions to merely prevent resort to what they call the "subterfuge of partnership," why did not the unions provide that in the event that the employer was a partnership, that then and then only would the employers not have the right to work in their business?

Be that as it may, Senn was a sole trader and the demand made upon him by the unions was that even though he continued to be a sole trader he had to give up his right to work with his hands in his business. No provision was made to enable Senn to continue to work with his hands in his business so long as he remained a sole trader.

Counsel states, at page 38 of his brief:

> "His (Senn's) right are no greater or less than those of his employees. Nor are they greater or less than those of organized labor. Each is asserting an allowable and recognized right."

No dispute between Senn and his employees is here involved. As we point out in our main brief on the merits, the conduct of the unions in the case at bar is illegal by reason of the illegality of the object and for the further reason that the activities are engaged in by a combination

of persons neither employees nor representing any of the employees of Senn.

At pages 45-46 of Respondent's Brief appears an excerpt from a quotation in a note at 3 A. L. R. 1295. The excerpt quoted by counsel ends with the statement, " 'So, also, it would seem that in order to procure the work for themselves, one's employees might lawfully give their employer the option of relinquishing the work done by him, or of doing without their services (citing cases).' "

May we call the court's attention to the fact that the note quoted from goes on to say,

> "even though they (one's employees) may not do so for the purpose of compelling him to employ another member of their union."

If the employees themselves cannot do that and a strike of the employees for that object would not be legal, how can it be said that a combination of persons, neither employees nor representing employees of an employer, may picket and harrass him for the purpose of "compelling him to employ another member of their union."

Under Points II and III of the Respondent's Brief, the position is asserted that the Wisconsin Labor Code merely incorporated into statutory form the principles of the common law of Wisconsin and other states. This is not true. In *A. J. Monday Co. v. Automobile, A. & V. Workers,* 171 Wis. 532, 177 N. W. 867, the question presented to the Supreme Court of Wisconsin was whether or not a *strike of employees* for a closed shop was made legal by Chapter 211 of the Laws of Wisconsin of 1919, which provided that no restraining order or injunction shall issue in disputes "concerning terms or conditions of employment." In holding that a strike for a closed shop was illegal, the Supreme Court of Wisconsin stated (p. 540):

"Ch. 211 was an attempt to engraft upon the laws of this state certain provisions of the act of Congress of October 15, 1914 (38 U. S. Stats. at Large, 730, ch. 323), commonly known as the Clayton Act. This was done without any reference to the fundamental distinction between the power of Congress to regulate procedure in and limit the jurisdiction of federal courts, inferior to the United States supreme court, and the power of the legislature to regulate procedure and limit the jurisdiction of the courts created by the constitution of a state.

"We shall not enter into any discussion of the provisions of ch. 211, the economic policies involved therein, or the constitutionality of that act, for we are of the opinion that it has no application to the facts in this case; hence any discussion here would be merely academic. The right of an employer to exercise his constitutional privilege as to whom he will employ has been fully established in this state. *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 90 N. W. 1098.

"*The provisions of sec. 1, ch. 211, are simply declaratory of the law as it existed prior to its enactment.* No one is here contending that *Local No. 25* is an illegal combination. No question of wages is involved, so the declaration of this section as to the character of labor is immaterial here. Sub. 1, sec. 2, provides that working people may organize themselves into an association for certain purposes there enumerated. The strike involved in this case was not called for the purpose of doing any of the things therein enumerated. It is a strike purely and simply for the closed shop. The closed shop does not aid the members of *Local No. 25* to become more skilful or efficient workers, to promote their general welfare, elevate their character, or to regulate their wages, hours, or conditions of labor in any except an indirect and remote way. It is conceded in this case that the plaintiff was paying the union scale of wages, and there is here no complaint as to the conditions under which the employees of the plaintiff were required to work. Sub. 2, sec. 2, provides that injunctions shall not issue in disputes 'concerning terms or conditions of employment.' In this case there is no such dispute. This

> is a strike to compel the plaintiff to employ none but the members of the union, and thereby to prevent him from employing persons not members of the union. It has nothing to do with wages, hours, or conditions of employment." (Italics ours)

In this connection, we respectfully request that this court read the case of *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530, 90 N. W. 1098, referred to by the Supreme Court of Wisconsin in the *Monday* Case. The *Kreutzberg* Case contains a very exhaustive and illuminating discussion on the limitations of the police power of the state, particularly applicable to the consideration of that question in the case at bar.

If, as held by the Supreme Court of Wisconsin in the *Monday* Case, under the established law of Wisconsin, a strike of employees for a closed shop was illegal, it is not difficult to imagine what the Supreme Court of Wisconsin, prior to the enactment of the Wisconsin Labor Code, the constitutionality of which is here involved, would have said if it had been called upon to pass upon the facts here involved. Here we not only have *no strike of employees*, but we have picketing by strangers to establish not only a closed shop, so far as Senn's employees are concerned, but a *super-closed shop* in the respect that Senn is asked to relinquish his right to work in his own business to make a job for another union man.

We fully recognize that with the passage of time more and more legislation favorable to organized labor has been enacted and in a sense labor has achieved a preferred status under the law. We are not here questioning the Wisconsin Labor Code or other similar statutes in so far as they vest certain additional powers and privileges in organized labor, excepting only that we do question the constitutionality of the Wisconsin Labor Code as construed by the Supreme Court

of Wisconsin in the case at bar and *as applied to the facts here involved.*

In 1911 it was already pointed out by this court that:

> "The very fact that it is lawful to form these bodies (labor unions), with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventive powers of a court of equity. *When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one.*" (Italics ours)
>
> *Gompers v. Buck's Stove & R. Co.*, 221 U. S. 418, 439, 55 L. Ed. 797.

In this year 1937, the statement hereinabove quoted is particularly significant. How much vaster and more powerful are labor unions today than they were in 1911. We are here invoking the protection of the Federal Constitution "to protect the one against the many."

We shall not refer individually to the many cases referred to by counsel in his brief. All of the cases cited by counsel are entirely foreign to the issues here involved.

Apparently, the case most relied upon by counsel is the case of *Wallace v. International Association of Mechanics*, 63 Pac. (2d) 1090, cited at pages 13 and 93 of the Brief of Respondents, and from which counsel quotes at some length at pages 94 and 105 of his brief. It is significant to note that while the picketing involved in that case was engaged in by parties not employees of the employer nor representing the employees, there was not involved the right of an employer to work in his own business. In this connection, the Oregon court stated:

> "We agree fully with the contention of the plaintiffs that there must be a reasonable justification for picketing. There must be an actual bona fide dispute. Picketing must be peacefully carried on and it must be for a lawful purpose."

Most of the opinion of the court in the *Wallace* Case was devoted to the question of the construction of the Oregon Labor Code and the court concluded that the Labor Code permitted picketing by labor unions representing none of an employer's employees. The court devoted only one paragraph to the question as to whether or not the statute, as construed by it, was constitutional, saying in this respect:

> "Is the statute as thus construed unconstitutional? Plaintiffs challenge the validity of the act upon three grounds, viz.: (1) It is class legislation and denies equal protection of the laws; (2) It violates the due process clause of the federal and state Constitutions; (3) It deprives courts of the inherent power to grant equitable relief. These same objections against the validity of the act were urged by complainants in a companion case of *Starr v. Laundry and Dry Cleaning Workers' Local Union*, this day decided, but the constitutionality of the act was sustained. We see no need of repetition."

Accordingly, it appears that the Oregon court in the *Wallace* Case held the Oregon Labor Code constitutional, construed as legalizing picketing by parties not employees, on the strength of its decision in the case of *Starr v. Laundry & Dry Cleaning Workers' Union*, 63 Pac. (2d) 1104. The *Starr* Case involved an actual strike on the part of the employees of the plaintiff. In that case, the court, among other things, stated:

> "• • • we must not be understood that picketing may be practiced merely to gratify a whim or caprice. Only when there is a reasonable ground for resorting to it, should the courts sanction it.
>
> • • •
>
> "Plaintiff also cites *Truax v. Corrigan*, 257 U. S. 312

(66 L. Ed. 254, 42 S. Ct. Rep. 124, 27 A. L. R. 375). This case treats the provisions of paragraph 1464 of the Revised Statutes of Arizona as denying the right of injunctive relief in cases involving labor disputes. Such a construction was given to the Arizona statute by the supreme court of Arizona. (See report of the same case, 20 Ariz. 7 (176 P. 570), and report of *Truax v. Bisbee Local No. 380*, 19 Ariz. 379 (171 P. 121).)

"In fact, the federal supreme court understood that the Arizona supreme court construed the Arizona statute to deny a remedy of any kind in cases involving a labor dispute. We quote from the opinion of the federal court:

"'The opinion of the State Supreme Court in this case, if taken alone, seems to show that the statute grants complete immunity from civil or criminal action to the defendants, for it pronounces their acts lawful.' *Truax v. Corrigan, supra.*

"It is true that following the above excerpt, the opinion contains the statement that, —

"'"If, however, contrary to the construction which we put on the opinion of the Supreme Court of Arizona, it does not withhold from the plaintiffs all remedy for the wrongs they suffered, but only the equitable relief of injunction, there still remains the question whether they are thus denied the equal protection of the law.'

"In the case at bar, the controlling provisions of the statute in question, as we construe them, merely prescribed the procedure to be followed and do not purport to deny the right to injunctive relief. We refer to sections 7 to 9, inclusive, of said chapter 355, Oregon Laws 1933." (Italics ours)

As we pointed out in our brief in opposition to the appellees' motion to dismiss, the Wisconsin Labor Code differs from the Norris-La Guardia Act and the labor codes of other states patterned after it in the respect that under Section 103.53 of the Wisconsin Labor Code, it declares the acts therein enumerated, including picketing and related activities in a labor dispute, as *lawful*. In this respect, the Wis-

consin Labor Code differs from the Oregon Labor Code and the significance of this distinction is apparent from the statement in the opinion of the Oregon court in the *Starr* Case that "The controlling provisions of the statute in question, as we construe them, merely prescribed the procedure to be followed and do not purport to deny the right to injunctive relief."

The Wisconsin Labor Code is not merely a procedural statute. The Wisconsin Labor Code, as construed by the Supreme Court of Wisconsin in the case at bar and as applied to the facts here involved, denies appellant not only equitable relief but denies him any relief or remedy whatsoever, either in equity or at law. Particularly significant in this connection is the following language from the case of *Aberdeen Restaurant Corp. v. Gottfried, et al.*, 285 N. Y. S. 832, cited by counsel at pages 13 and 93 of his brief:

> "In *Levering-Garrigues Co. v. Morrin*, (71 Fed., 2d, 284) the Norris-La Guardia Federal Labor Injunction Act (29 U. S. C. A., secs. 101 to 115), upon which the state statute is patterned, was held applicable to actions commenced prior to the passage of that act where no final decree had been entered. That authority also holds the Federal Law constitutional. The court is not oblivious to the fact that there are certain elements in the basis of federal equity jurisdiction which prevent a complete analogy between the authority cited and the issue here under consideration so as to make the federal decision conclusive. The important distinction between federal equity jurisdiction and that of this court is that the former is statutory while the latter is constitutional. Naturally, whatever Congress has granted to the court of its own creation it may control. It therefore follows that no constitutional right is infringed by a congressional curtailment of a remedy or a withdrawal of remedial rights from the jurisdiction of the District Court, since the litigant never had any absolute constitutional right to have a federal court take jurisdiction. Vastly different is the position of the state court. Con-

stitutionally, equity jurisdiction is an inherent element of the state court. If a litigant is entitled to an equitable remedy and has no adequate legal remedy, a destruction of such right of redress would be a denial of justice and thus a violation of both state and federal constitutions. In fact, in *Duplex Co. v. Deering* (254 U. S., 443), the Supreme Court of the United States so held. It there seemed to the court that the state statute practically granted *'complete immunity of any civil or criminal action to the defendant, for it pronounced their acts lawful.'* In this matter, however, there is no deprivation of the right to an injunction. *If such was the effect of chapter 477 of Laws of 1935 it unquestionably would be unconstitutional.* (Italics ours) Here there is only an effort to limit the circumstances under which an injunction can be obtained."

Thus, in the *Aberdeen* Case, not only is the distinction between the Norris-La Guardia Act and the state labor codes patterned after it clearly drawn, but it is also definitely stated that if the labor code had the effect of granting complete immunity of any civil or criminal action on the ground that the acts were declared to be lawful, it would be inconstitutional.

Counsel, at page 125 of his brief, states:

> "We readily concede that if there is no labor dispute peaceful picketing should be enjoined, not because it is equivalent to physical violence, but because it works an injury upon another without legal cause."

Thus, counsel, in this statement, recedes from the position taken by him earlier in his brief that picketing is merely the exerting of "lawful economic pressure," and that it is legal as long as there is no violence or any other "unlawful" act engaged in. The very basis upon which we are claiming that the Wisconsin Labor Code, as construed by the Supreme Court of Wisconsin, as applied to the facts in the case at

bar, violates the Fourteenth Amendment to the Federal Constitution is that the picketing here engaged in works an injury upon Senn "without legal cause."

The numerous cases cited by us in our main brief on the merits amply establish that picketing, when engaged in for the purpose of forcing an employer to give up his right to work with his hands in his own business, is without legal cause, and that picketing engaged in by parties neither employees nor representing any employees of an employer is without legal cause.

Respondents' Brief, for the most part, is devoted to a consideration of cases holding the Norris-La Guardia Act constitutional under the facts here involved and holding state labor codes constitutional under the facts there involved. We are not taking the position that the Wisconsin Labor Code, under proper facts and under a different construction, would be unconstitutional. Our sole position on this is that the Wisconsin Labor Code, as construed by the Supreme Court of Wisconsin in the case at bar and as applied to the facts here involved, deprives the appellant of property without due process and denies him the equal protection of the laws.

PART II

REPLY TO BRIEF FILED BY AMICI CURIAE

The brief filed by the International Juridical Association, amici curiae, covers two main propositions:

(1) The jurisdiction of this Court, and

(2) The determination of the question on the merits.

A.

Jurisdiction.

It is asserted that this case "could have been decided upon principles of general law without reliance upon any statute."

In this connection counsel states that "the trial court found what it considered to be 'the controlling rule' in judicial doctrine and not in any statute," and that "the challenge here is not to a statute but to a judicial decision based upon principles of general law."

There are at least three answers to this position:

1. That the decision of the trial court was based upon a conclusion of law (Conclusion of Law No. 1, R. 29) that a labor dispute existed within the meaning of the Labor Code and not upon a determination that the activities of the defendants were legal apart from the Labor Code.

2. That the Supreme Court of Wisconsin based its decision, not on the common law, but on the statute, as evidenced by the following statement from the majority opinion:

> "The *legislature*, in outlining the public policy of this state, has precluded him (Senn) from an appeal to the courts for assistance until some unlawful act has become imminent, or something has occurred to start in motion the administration of equity rules, or the performance of the duties of policing." (R. 121) (Italics ours)

This is also evidenced by the opinion of Mr. Justice Fairchild on the motion for re-hearing and the statement therein contained that the question of the constitutionality of the Labor Code was fully considered by the court in its decision in the case. (R. 132)

3. The decisions of the Supreme Court of Wisconsin in cases arising prior to the adoption of the Wisconsin Labor Code established the fact that the law in Wisconsin, if no effect is to be given to the Wisconsin Labor Code, is that in a case involving facts substantially of similar character as those involved in the Senn case, the employer would have been entitled to and would have received relief.

A. J. Monday Co. v. Automobile, A. & V. Workers, 171 Wis. 532.

In that case, the Wisconsin Supreme Court stated:

> *"The provisions of Sec. 1, ch. 211 are simply declaratory of the law as it existed prior to its enactment.* No one is here contending that *Local No. 25* is an illegal combination. No question of wages is involved, so the declaration of this section as to the character of labor is immaterial here. Sub. 1, sec. 2, provides that working people may organize themselves into an association for certain purposes there enumerated. The strike involved in this case was not called for the purpose of doing any of the things therein enumerated. It is a strike purely and simply for the closed shop."

As we pointed out under Part I of our brief, the Supreme Court of Wisconsin, in the *Monday Case,* held that under the established law of the State of Wisconsin before the adoption of Chapter 211, which was an attempt to engraft upon the laws of Wisconsin certain provisions of the Clayton Act, a strike of employees against an employer to force him to agree to a closed shop was illegal. If, under the established law of the State of Wisconsin, as declared in the *Monday* Case, it was illegal for employees to strike against their employer to force him to agree to a closed shop, how can it be asserted,—as is asserted in the brief of the friend of the court,—that Senn was denied relief, not by virtue of the Wisconsin Labor Code, but "upon principles of general law"?

In the *Monday* Case it was held that it was illegal for the employees themselves to engage in a strike against an employer to force him to engage only union help. In the case at bar much more is involved. Here the picketing is engaged in not by Senn's employees but by strangers. Here the object of the picketing is not only for a closed shop but for a *super-closed* shop in the respect Senn is asked to relin-

quish his right to work in his own business so that a job will be made available for someone else.

In support of the proposition that picketing for the purpose of forcing an employer to give up the right to work in his own business is legal without reliance upon any statute, the case of *Zoat (Zaat)*, 172 Wash. 445, 20 Pac. (2d) 589, is cited. This case has already been considered by us in Part I of our brief. To what we have there said we would like to add that the question before the Washington court in the *Zaat* Case was whether or not the complaint stated a cause of action *in view of the Washington anti-injunction law.*

It is further stated in the brief of the friend of the court that "if it be argued that the decision below was based upon a Federal ground, we have shown that it was also based upon an independent non-federal ground broad enough to sustain the judgment." What we have heretofore stated answers this contention.

It is clearly established by the *Monday* Case and the case of *State, ex rel. Zillmer vs. Kreutzberg,* 114 Wis. 530, 90 N. W. 1098, that but for the Wisconsin Labor Code, as construed by the Supreme Court of Wisconsin in the case at bar Senn would have been entitled to the relief demanded on the facts herein involved. The sole and only question involved in this case is whether or not the Wisconsin Labor Code, as construed by the Supreme Court of Wisconsin in the case at bar and as applied to the facts here involved, is valid under the Fourteenth Amendment of the Federal Constitution. If it is not, clearly, Senn would have been entitled to and would have received the relief which he sought.

It is next asserted in the brief of the friend of the court that "even if the decision appealed from had been based

solely upon the provisions of the Wisconsin Labor Code here sought to be questioned, the appellant has failed to show, and cannot show, that he is injured by such provision." What counsel had in mind in making the foregoing statement appears in the statement which follows: "There is nothing in this case to show that the provisions of the Wisconsin Labor Code here sought to be questioned are not merely declaratory of the general law as it existed in Wisconsin prior to the statute or that the case would have been decided in appellant's favor in the absence of statute." The *Monday* Case, we submit, conclusively answers this contention.

It is next asserted that "Under any view of the case the appeal should be dismissed for want of a substantial federal question." We respectfully submit that the federal question here involved is as substantial, if not more substantial, than the questions involved in the *Truax, Duplex, Tri-City, Hitchman,* and *Adair* Cases, to which we refer in our brief in opposition to appellees' motion to dismiss.

If the Wisconsin Labor Code, as construed by the Supreme Court of Wisconsin and applied to the facts in the case at bar, is to be sustained under the Fourteenth Amendment, the power of labor unions will be increased, and the scope of picketing will be extended, far beyond the scope for which it has heretofore been employed and championed. Picketing will become the common order of the day. Barbers, shoemakers, tailors, grocers, butchers, and all the rest of the employers in similar small businesses, who are willing to employ union help, will, nevertheless, be picketed to force them to give up the right to work with their hands in their own businesses. If the validity of such picketing for such object and purposes by labor unions representing none of an employer's employees is to be sustained, it will mean the end of all small businesses because, as pointed out in the minority

opinion in the case at bar and the majority opinion in the *Roraback Case*, no one will be able to start in business for himself or, for that matter, continue in business for himself, unless he has capital enough to engage in business on a large enough scale to enable him to advantageously devote his time and efforts in an administrative capacity only. If the decision of the Supreme Court of Wisconsin in this case is not reversed by this court, *it may well mean that it spells the doom of the small middle class business man.*

B.

The Merits.

It seems that the point most relied upon by counsel in the brief of the friend of the court, in considering the matter on the merits, is the point raised on the quesion of jurisdiction to which we have heretofore alluded, namely, that peaceful picketing was lawful in Wisconsin without the Labor Code.

Counsel attempts to distinguish the case of *Truax v. Corrigan*, 257 U. S. 312, 66 L. Ed. 254, on the ground that the Arizona statute, which was held invalid by this court, attempted to legalize conduct which the Supreme Court of Arizona had, prior to the enactment of the statute involved, declared unlawful. Counsel contends in this connection:

> "In Wisconsin, on the other hand, peaceful picketing has never been rejected as a lawful and legitimate instrument for the protection of the right of labor to bargain collectively."

As we have heretofore pointed out, this is not a correct statement and does not comport with the law.

A. J. Monday Co. v. Automobile, A. & V. Workers, 171 Wis. 532, 177 N. W. 867

State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098.

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Wisconsin, affirming the judgment of the Circuit Court of Milwaukee County, Wisconsin, denying the appellant the injunctional relief which he sought, be reversed with directions to the Supreme Court of Wisconsin to direct the trial court to grant the relief requested by the appellant in his complaint.

All of which is respectfully submitted.

LEON B. LAMFROM,

Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936.

No. 658.

PAUL SENN,

Appellant,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL NO. 5, CHARLES SCHREIBER et al.,

Respondents.

Appeal from the Supreme Court of the State of Wisconsin.

BRIEF OF RESPONDENTS IN SUPPORT OF MOTION TO DISMISS FOR WANT OF JURISDICTION.

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SUPREME COURT OF THE UNITED STATES.

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PAUL SENN,

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vs.

TILE LAYERS PROTECTIVE UNION, LOCAL NO. 5, CHARLES SCHREIBER et al.,

Respondents.

Appeal from the Supreme Court of the State of Wisconsin.

BRIEF OF RESPONDENTS IN SUPPORT OF MOTION TO DISMISS FOR WANT OF JURISDICTION.

NATURE OF APPEAL.

This is an appeal from a judgment of the Supreme Court of the State of Wisconsin, handed down on June 29th, 1936, affirming a judgment of the trial court, the Circuit Court of Milwaukee County, in favor of the respondents, denying the appellant a permanent injunction to enjoin the respondents from engaging in certain acts growing out of a labor dispute.

MATERIAL FACTS.

The appellant, Paul Senn, first learned the trade of tile setting in Miami, Florida, in 1930, during which year he worked approximately two weeks as a helper and eight months a a tile setter (R. 48). In 1931 he came to Milwaukee and entered into the tile-laying business under the name of Paul Senn & Co., an unincorporated firm, and started to solicit work as a plastering and tile-setting contractor (R. 49). Previous to this time he had been a plastering contractor (R. 47, 48).

One of his first acts upon starting business in Milwaukee was to confer with Mr. Melville, president of the Tile Setters Union, Local 5, relative to co-operating with union regulations in the tile-setting industry. At that time the union had no formal contracts with the various other employers and contractors in the city, but did have what might be considered "gentlemen's agreements" regarding the hiring of union labor and complying with union rules. The appellant agreed to co-operate (R. 85). Later, upon visiting one of the jobs on which Mr. Senn was employed, Mr. Melville discovered that he was not working under union rules, since he (Mr. Senn) was working as a nonunion helper with a union journeyman; and also employed another nonunion man, his brother, to help on the job. He was informed of the facts, but did nothing to correct them (R. 39-41, 86, 88).

The labor history of appellant over the period of years starting with 1931 and until 1935, when the dispute with respondents became acute, indicates that no attempt was ever made to conform with union rules and regulations either in number of hours worked (R. 70), or Sunday employment (R. 71), or in payment of the union scale of

wages (R. 71, 73-76). The record further indicates that he employed his brother and used him as a helper approximately 10 per cent of the time (R. 69; Old Record 141-142); that he entered into a partnership with William Neidner, a union journeyman, who gave up his membership in order to enter into the partnership (R. 70); and for the past two and a half years he has employed Arnold Holly, a suspended union member, knowing of Holly's suspension and the reasons therefor (R. 70-71). The question of Holly's reinstatement into the union as a condition precedent to Senn entering into the contract is a basis of dispute (R. 34-35, 54, 58).

During the entire period that the plaintiff was engaged in the tile contracting business a great deal of his time was devoted to working either as a helper or a tile setter, performing work within the scope of the journeyman's craft (R. 49, 50; Old Record 84, 86-89, 177). Most of the work he did was that of a tile setter. From May, 1934, to May, 1935, out of a total of 1,777 hours on jobs, he attributes 771 hours to himself, or 40 per cent (R. 51, 53).

After the original negotiations which took place when appellant entered into the contracting business the record shows that there were occasional conferences with union officials. Finally, in March, 1935, the proposed contract was submitted to Mr. Senn, who refused to sign it because of article III; a series of conferences was to no avail (R. 37), and in December, 1935, the Tile Layers Protective Union, Local No. 5, started to picket his premises, which are his home and office, and to follow his truck from his garage to his jobs to ascertain where those jobs were for the purpose of picketing (R. 40-41). The pickets varied in number from two to four, picketed only on working days, and used no violence (R. 63, 64). Senn decided on meeting this economic pressure by counter activities; he

decided to go into the brokerage business and sell tile indiscriminately to any buyers and thereby "wreck" the industry (R. 41, 61, 72-3). In pursuance of this plan he sent letters to contractors and inserted a "blind ad" in the Milwaukee Journal (R. 72-73).

During the period of 1931 to 1935 the tile industry in Milwaukee had been in a very poor condition (R. 76-77, 83, 86), and this condition had been further aggravated by unskilled persons, and others, starting to compete in the trade and going into the contracting business (R. 38, 87). Membership in the tile layers union decreased from 112 in 1929 to 41 in 1935 (R. 90).

It was because of these conditions that the local union adopted the rule which was incorporated in the proposed contract as article III (R. 87, 90). In co-operation with the union at least seven tile contractors, constituting the greater majority of them, entered into the contract. In all of these firms recognized craftsmen who would have been eligible to membership in the union if they were not employers, but who were partners in or owners of the contracting firms, abided by article III of the contract (R. 43, 87).

As to Mr. Senn's qualifications as a skilled craftsman in the tile-laying industry, there is no dispute about the fact that he has fulfilled none of the requirements of the union's by-laws and thus he would not have been eligible to membership in the union in any event. He has not served the required apprenticeship nor pursued the course of study required to entitle him to be recognized as a practical tile setter (R. 66-68). While there is testimony by himself and his employee that his work is satisfactory, the record also shows that the only building contractor who testified as to his skill admitted that he had never seen Senn do what is considered highly skilled or technical work (Old

Record 196-197), and further testimony by veteran members that one with Mr. Senn's limited training and experience could not be considered a practical mechanic (R. 95-96, 100-101). Senn was advised of this during the negotiations with the union and was told that under such circumstances the union could not allow him to work with the tools of the trade, nor, because of union rules, to allow its members to work with him (R. 34, 79, 84).

The defendant unions are allied with the larger International Union, comprising a number of building trades crafts. All these crafts require service as an apprentice before a man may be considered a journeyman craftsman entitling him to do the work of a practical mechanic (Constitution, pages 68, 69, 70).

The Wisconsin Labor Code, Sections 103.51 to 103.63, Statutes of 1935, set out in the appendix, enumerates what is to be considered lawful conduct in labor disputes. Such lawful conduct is defined as including giving publicity and information regarding the existence of a labor dispute, ceasing to patronize or to employ any person or persons, and peaceful picketing and patrolling. The act defines labor disputes, and further provides that restraining orders shall be issued under certain circumstances and for limited periods, and that injunctions shall not be issued except after a hearing had and certain facts found to exist. The facts to be found are:

> (a) That unlawful acts have been threatened or committed and will be executed or continued unless restrained;
>
> (b) That substantial and irreparable injury to complainant's property will follow unless the relief requested is granted;
>
> (c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial

thereof than will be inflicted upon defendants by the granting thereof;

(d) That the relief to be granted does not violate the provisions of section 103.53;

(e) That complainant has no adequate remedy at law; and

(f) That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection.

After due trial the Court found that the facts in the instant case established that there existed a labor dispute; that the acts and conduct of respondent union were lawful and in furtherance of such lawful labor dispute, and that the appellant was not entitled to relief. The Court also found that the objects of the union in its dispute with the appellant were as follows (R. 28):

15. "That the tile industry for some years last past has been in a demoralized state because of a lack of building operations; that the defendants and their members have been in competition with nonunion tile setters and helpers in their effort to secure work as a means of livelihood; that for the purpose of enhancing the interests of the defendants and their members, the defendants and their members have found it necessary for the protection of their individual rights in the prosecution of their trade, to require of all employers agreeing to conduct a union shop to agree: 'That no individual, member of a copartnership or corporation engaged in the tile contracting business, shall work with the tools or act as helper, but that the installation of all materials within the classification of tile work shall be done by journeymen members of the Tile Layers Protective Union.'

16. "That the plaintiff, by virtue of his status of an employer and contractor, is not entitled to member-

ship in the defendant unions; that the constitution and rules of the defendant unions require, among other things, that a tile setter shall be a journeyman tile setter who shall have acquired his practical experience by virtue of an apprenticeship, and that such apprenticeship shall, among other things, consist of service as an apprentice of not less than three years; that the plaintiff has not served an apprenticeship as a tile setter in accordance with the rules of the defendant unions."

From these facts it was concluded that in furtherance of such objects:

"1. That a labor dispute exists between the plaintiff and the defendants respecting the unionizing of plaintiff's business on the terms proposed by the defendants; that the plaintiff and defendants are parties to said dispute, and that such dispute is within the definition of a labor dispute, as defined in the Labor Code, Sections 268.18 to 268.29 (now secs. 103.51-103.63), and subsections thereof, of the Wisconsin Statutes.

"2. That it is not unlawful for the defendants, in furtherance of said dispute, to advise, notify or persuade, without fraud, violence or threat thereof, any person or persons, of the existence of said labor dispute; that it is not unlawful for the defendants to give publicity to, and obtain or communicate information regarding the existence of facts (fol. 94) involved in such dispute whether by advertising, speaking, or patrolling any public street or any place where any person or persons may lawfully be, providing said acts are done without intimidation or coercion and without fraud, violence, breach of the peace, or threat thereof.

"3. That the defendants have not indulged in violence or fraud; that because of their statement made by their counsel in open court and in their presence,

that they will not send any more letters to owners, contractors, or architects as hereinbefore referred to, and will not indulge in any of the acts or conduct referred to in said letters, the Court concludes that no unlawful acts will be committed or will be executed or continued.

"4. That the agreement submitted by the defendants to the plaintiff, setting forth terms and conditions prevailing in that portion of the industry which is unionized, is sought by the defendants for the purpose of promoting their welfare and enhancing their own interests in their trade and craft as workers in the industry.

"5. That article III of said agreement is a reasonable and lawful rule adopted by the defendants out of the necessities of the employment within the industry and for the protection of themselves as workers and craftsmen in the industry.

"6. That the plaintiff is not entitled to the relief prayed for in his complaint.

"7. That the above-entitled action be dismissed on its merits without costs."

From such findings an appeal was taken based upon whether (1) the term "labor dispute" was applicable to a situation where the dispute was between members of a union engaged in the same craft or industry and an employer engaged in such trade, craft or industry, and (2) if such dispute existed, were the demands made upon the employer reasonable ones? It was contended that to find a dispute existed, and that the demands made were reasonable, the effect of denying a remedy by way of injunction is to deny the appellant the equal protection of the laws and to deprive him of his property without due process of law. The Wisconsin Supreme Court affirmed the findings of the trial court, and from this decision this appeal was taken.

SUMMARY OF ARGUMENT.

1. The Wisconsin Labor Code does not involve the Fourteenth Amendment; the federal question involved is no longer a substantial one by reason of prior adjudications of this Court.

(a) Limitations on the granting of injunctions are jurisdictional limitations which are within the proper power of the Legislature.

Duplex Printing Press Company v. Deering, 254 U. S. 443;
American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184;
Levering and Garrigues v. Morrin, 71 Fed. (2d) 284 (cert. denied 293 U. S. 595, 79 L. ed. 688);
United Electric Coal Company v. Rice, 80 Fed. (2d) 1 (cert. denied 297 U. S. 714, 80 L. ed. 1000);
Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112 (cert. denied 79 U. S. ..., ... L. ed. 1682).

(b) The federal question is no longer a substantial one, since it has been decided adversely to the appellant and prior United States Supreme Court decisions.

Truax v. Corrigan, 257 U. S. 312;
Duplex Printing Press Company v. Deering, 254 U. S. 443;
American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184.

(c) This question has also been decided uniformly in the lower state and federal courts.

Levering & Garrigues v. Morrin, 71 Fed. (2d) 284;
Fenske Bros. v. Upholsterers' International Union, 358 Ill. 239, 193 N. E. 112;

Miller Parlor Furniture Company v. Furniture W. I. Union, 8 Fed. Sup. 209;
Cinderella Theater Co. v. Sign Writers' Local Union, 6 Fed. Sup. 164;
Dean v. Mayo, 8 Fed. Sup. 73;
Starr v. Laundry Union, C. C. H. Labor Law Service, page 16841.
Wallace v. International Association of Mechanics, C. C. H. Labor Law Service, page 16846.

2. The findings of both the trial and appellate courts as to the reasonableness and purpose of the demand are findings of fact. Such findings of fact are not within the jurisdiction of this Court for the purposes of review. Under such findings of fact no federal right has been denied to the appellant.

(a) Findings of fact in the state courts are binding unless ascertained to be without support in the evidence, or unless clear error is shown.

Ward & Gow v. Krinsky, 259 U. S. 503, 42 S. Ct. Rep. 529;
Borden Products Co. v. Ten Eyck, 297 U. S. 251;
Thayer v. Spratt, 189 U. S. 346, 23 S. Ct. Rep. 576.

(b) Upon a finding of fact that the peaceful actions of a union are directed to the legitimate objectives and purposes for which working men may organize, the resultant injury if there be one to the employer becomes *damnum absque injuria.*

Truax v. Corrigan, 257 U. S. 312;
Duplex Printing Press Company v. Deering, 254 U. S. 443;
American Steel Foundries v. Tri-City Central Trades Council, supra;

New Jersey Painting Company v. Local 26, 96 N. J. Eq. 632, 126 Atl. 399, 47 A. L. R. 384;
Exchange Bakery & Restaurant v. Rifkin, 245 N. Y. 260.

3. The appellant not having met any of the qualifications set up by the union for a qualified practical mechanic, the terms of the proposed contract are justifiable on that basis alone. Such union rules and regulations are not within the jurisdiction of this Court for the purposes of review.

Mayer v. Journeymen Stone Cutters' Union, 47 N. J. Eq. 519, 20 Atl. 492;
Snow v. Wheeler, 113 Mass. 179;
Carew v. Rutherford, 106 Mass. 114;
New Jersey Printing Company v. Local 26, 96 N. J. Eq. 632, 126 Atl. 399, 47 A. L. R. 384.

ARGUMENT.

I.

THE WISCONSIN LABOR CODE DOES NOT INVOLVE THE FOURTEENTH AMENDMENT; THE FEDERAL QUESTION INVOLVED IS NO LONGER A SUBSTANTIAL ONE BY REASON OF THE PRIOR ADJUDICATIONS OF THIS COURT.

It is the respondent's position that the United States Supreme Court has not jurisdiction in this matter since the Wisconsin Labor Code does not involve the Fourteenth Amendment. Also, the federal question involved is no longer a substantial one. The enactment of the code is within the legitimate exercise of the police power of the state in limiting equitable relief by way of injunction in order to promote the public welfare, safety and morals of society. The limitation of this equitable relief is not meant to be nor is it declared to be an adjudication of the rights of the appellant in an action at law for damages. Set out in the appendix hereto is the report of the House Judiciary Committee on the Norris-LaGuardia Act. At page 60 through 69 there is an extended discussion and citation of authorities as to the rights of Congress to limit the equity jurisdiction of the federal courts. Also, at page 88 of the report of the Senate Judiciary Committee, appearing in the appendix, there is a discussion of the same proposition.

These authorities and suggestions are likewise applicable to the rights of state legislatures in dealing with the equity jurisdiction of state courts. We quote from the decision in the case of **American Furniture Company v. I. B. of T. C. and H. of A.**, 268 N. W. 250 (not yet officially

reported), which was decided at the same time as the instant case, and which is set out in the appendix:

> "• • • It is beyond question that the legislature may change the substantive law and in doing so increase or reduce the subject matter upon which the jurisdiction of courts operate. It may enact a statute creating a crime or repeal such a statute. The first enactment does not increase nor does the latter diminish the jurisdiction of a court. It merely is an exercise of the power of the legislature to declare the public policy of the state and punish offenses against its sovereignty. Unless there is some other constitutional objection, such laws would not be invalid as interferences with the jurisdiction of the courts. When the legislature makes peaceful picketing valid under certain prescribed circumstances it leaves nothing for an injunction to operate upon. The provisions of such a law are substantive in character. They may or may not be unconstitutional on some other ground, but it is certain they are not unconstitutional upon the ground assigned."

A similar jurisdictional question involving the Norris-LaGuardia Act (the federal law, of which the Wisconsin Labor Code is a counterpart) was raised in the case of **Levering & Garrigues v. Morrin et al.**, 71 Fed. (2d) 284 (1934) (C. C. A. [2d]), in which the Court said:

> "Since Congress may curtail this remedy or withdraw the jurisdiction of the District Court, no constitutional rights based upon the withdrawal of remedial rights can be successfully raised, since the litigant never had an absolute constitutional right to have a federal court take jurisdiction."

Certiorari denied in this case in 293 U. S. 595, 79 L. Ed. 688 (1934).

Likewise, similar questions were raised in the case of **United Electric Coal Company v. Rice**, 80 Fed. (2d) 1 (C. C. A. 7th), wherein it was claimed that limiting the power of a federal court of equity to restrain threatened injuries to property is unconstitutional. The Court held:

> "Inasmuch as Congress may take from as well as confer upon inferior federal courts jurisdiction of cases which involve controversies between different states • • • we find no support for a conclusion which would deny validity of this legislation.
>
> "The legislation in question took from district courts jurisdiction of cases involving labor dispute injunction suits between citizens of different states, in certain limited instances, and was within the power of Congress conferred by Article III, Sections 1 and 2, of the United States Constitution."

Certiorari was denied in this case in 297 U. S. 714, 80 L. Ed. 1000 (1935).

In the recent case of **Starr v. Laundry and Dry Cleaning Workers Union** (not yet officially reported, but appearing at page 16841 of the C. C. H. Labor Law Service, decided December 29, 1936), we find this pertinent statement:

> "At all times legislation, prescribing the procedure in cases brought to secure injunction has been recognized as controlling upon the courts. We find support in reasons of public policy why the procedure in labor cases should be different from that to be followed in other cases."

Likewise, in the case of **Fenske Bros. v. Upholsterers International Union**, 358 Ill. 239, 193 N. E. 112, 97 A. L. R. 1318 (Ill.), the Illinois Supreme Court, in discussing the validity of the Illinois Anti-Injunction Act, held such act to be constitutional on the precise procedural question.

Certiorari was denied in this case in 79 U. S. (L. Ed.) 1682, 55 Sup. Ct. 645 (April, 1935).

In the case of **Duplex Printing Press Co. v. Deering**, 254 U. S. 443, this Court had occasion for the first time to consider paragraph 20 of the Clayton Act. This section of the act provides:

> "That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms, or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described in particularity in the application, which must be in writing, and sworn to by the applicant, or by his agent or attorney.
>
> "And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work, or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful or lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peace-

fully assembling in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

The foregoing provisions are limitations upon courts of equity in respect to issuance of injunctions. The Court not only did not invalidate these restrictions, but held that they put into statutory form familiar restrictions upon the granting of injunctions already established, and of general application in the equity practice of the courts of the United States.

We believe that the Court's observations as to the validity of Section 20 of the Clayton Act are herein pertinent; that the "familiar restrictions upon the granting of injunctions already established, and in general application, in the equity practice of the courts of the United States," are valid restrictions and a legitimate exercise of congressional powers not in violation of the Fifth or Fourteenth Amendments to the United States Constitution.

Likewise, in the case of **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184, this Court again considered Section 20 of the Clayton Act, saying:

> "It is clear that Congress wished to forbid the use by Federal Courts of their equity arm to prevent peaceable persuasion by employees, discharged, or **expectant**, in **promotion of their side of the dispute**, and to secure them against judicial restraint in obtaining or communicating information in any place where they might lawfully be. This introduces no new principle into the equity jurisprudence of those courts. It is merely declaratory of what was the best policy always. Congress thought it wise to stabilize

this rule of action and render it uniform." (Emphasis ours.)

The application of the principles of law to Section 20 of the Clayton Act and Sections 103.51 to 103.63 of the Wisconsin Statutes are essentially the same. Both Section 20 of the Clayton Act and Sections 103.51 to 103.63 of the Wisconsin Statutes limit or restrict the use of injunctions in labor disputes after defining what such disputes are; and both enumerate actions in connection with such labor dispute that are deemed to be lawful acts in restraint of which a court of equity may not issue an injunction.

While it is true that in the **Duplex** and **American Steel Foundries** cases certain injunctions were allowed to issue, such injunctions were issued only because the Court determined that under the Clayton Act the provisions did not extend as far as they were claimed to by the unions, and the conduct complained of consisted of violence and secondary boycotting. The Court did not declare an extension of the act to other disputes "free from fraud, violence, breach of the peace or threat thereof" [Wisconsin Statutes, 103.53 (c)] would result in unconstitutional legislative power, but based its decisions on what it considered to be a correct construction of the Clayton Act.

In the instant case, the Wisconsin Supreme Court, in determining the legislative intent, concluded that the term "labor dispute," as used and defined in the Wisconsin Labor Code, included disputes between unions composed of members engaged in the same craft, trade or industry of the employers and employers engaged in such craft or industry. This construction was based not only upon what the Court concluded to be the legislative intent, but also upon the wording of the Wisconsin statute, which is broader than the terms of Section 20 of the Clayton Act

in its definitions of labor disputes and those who are participants therein. As pointed out in the decision of the Wisconsin Supreme Court in the case of **American Furniture Company v. I. B. of T. C. and H. of A. Chauffeurs, Teamsters and Helpers of Local No. 200 of Milwaukee et al.**, supra, the inclusion in the Wisconsin statute [section 103.62 (3)] of the language "regardless whether or not disputants stand in the proximate relation of employer and employee" was meant to overcome the restrictive language of the Clayton Act as construed in the **Duplex Case**, and when construed with other pertinent sections of the statute clearly covers the situation presented in this case, that is, a dispute between an employer in a particular trade, craft or industry and an association of employees engaged in the same trade, craft or industry, whose wages, hours and working conditions are affected by that employer's practices. This proposition was affirmed in the case of **American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184, at page 209:

> "• • • It is thus probable that members of the local unions were looking forward to employment when complainant should resume full operation, and **even though they were not ex-employees within the Clayton Act, they were directly interested in the wages which were to be paid.**
>
> "Is interference of a labor organization by persuasion and appeal to induce a strike against low wages, under such circumstances, without lawful excuse and malicious? We think not. Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was de-

pendent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. **The right to combine for such a lawful purpose has, in many years, not been denied by any court.** The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. **To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because, in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership, and especially among those whose labor at lower wages will injure their whole guild.** It is impossible to hold such persuasion and propaganda, without more, to be without excuse and malicious. The principle of the unlawfulness of maliciously enticing laborers still remains, and action may be maintained therefor in proper cases; but to make it applicable to local labor unions in such a case as this seems to us to be unreasonable." (Emphasis ours.)

In the exercise of the appellate jurisdiction of the Federal Supreme Court over state courts the former court is

bound by the construction of a state law adopted by its court of last resort.

Ward & Gow v. Krinski, 259 U. S. 503, 42 Sup. Ct. Rep. 529, 66 L. Ed. 1033;
Thornton v. Duffy, 254 U. S. 361, 41 Sup. Ct. Rep. 137, 68 L. Ed. 304;
Quong Ham Wah Co. v. Industrial Accident Commission, 253 U. S. 445, 41 Sup. Ct. Rep. 337, 65 L. Ed. 723;
Faircomb v. Denver, 252 U. S. 7, 40 Sup. Ct. Rep. 271, 64 L. Ed. 424;
Guarantee Trust Co. v. Blodgett, 287 U. S. 509, 53 Sup. Ct. Rep. 244, 77 L. Ed. 463;
Hartford Accident & Indemnity Co. v. N. O. Nelson Mfg. Co., 291 U. S. 352, 54 Sup. Ct. Rep. 392, 78 L. Ed. 840.

The Wisconsin Act, as construed by the Wisconsin courts, enlarges the class of disputes in which the issuance of an injunction is limited, but the statute is still confined to disputes arising out of the rights of laboring men to pursue peacefully the objects for which they organize, free from judicial restraint. So the Wisconsin Labor Code still remains, in effect and purpose, the same type of legislation as Section 20 of the Clayton Act, and such legislation has never before been considered by this Court as a violation of the Fifth or Fourteenth Amendments (**Tri-City case**, supra). There are many cases in the federal and state courts which have adopted the same construction as the Wisconsin Supreme Court did in connection with both the Norris-La Guardia Act and state anti-injunction acts. Some of the cases which have adopted this construction are:

Levering & Garrigues v. Morrin, 71 Fed. (2d) 284 (1934, C. C. A. 2nd) (certiorari denied);

Miller Parlor Furniture Co. v. Furniture W. I. Union (District Court N. J.), 8 Fed. Supp. 209;
Cinderella Theatre Co. v. Sign Writers Local Union (D. C. Mich.), 6 Fed. Supp. 164;
Dean v. Mayo (Dist. Ct. La.), 8 Fed. Supp. 73;
Fenske v. Upholsterers International Union, 358 Ill. 239, 193 N. E. 112 (certiorari denied);
Starr v. Laundry & Dry Cleaning Workers Union (Oregon Sup. Ct., Dec. 29, 1936) (reported in C. C. H. at page 16841) (not yet officially reported); and
Wallace v. International Association of Mechanics, a companion case to Starr v. Laundry Workers, supra, C. C. H., page 16846.

In **Levering & Garrigues v. Morrin,** supra, the Court said:

> "We think that the relief granted in the decree appealed from is in violation of the above statute (Norris-La Guardia Act). The case grows out of a labor dispute as defined in Section 113 (c) and is a controversy between members of an association of employers and members of an association of employees engaged in the same industry [Sec. 113 (a), (c)]. The appellees were seeking to arrange terms or conditions of employment."

In the **Miller** case, supra, the Court said:

> "However, I am convinced, after carefully reading the aforesaid act of Congress, that it is intended to apply to just the situation here presented; that a labor dispute may arise by reason of the desire of a labor organization to unionize any factory in its line of business, and a Federal Court may not, against the effort of the union to accomplish its purpose, interfere with it or its members 'giving publicity to existence of, or the facts involved in, any labor dispute,

whether by advertising, speaking, patrolling, or by any other method not involved in fraud or violence' [29 U. S. C. A., Sec. 104 (e)]."

In the **Cinderella** case, supra, the Court held that a controversy to replace a nonunion employee by a union employee, none of the members of which union were employed by the employer, was a labor dispute within the Norris-La Guardia Act because

> "By the express terms of the statute, it is none the less a 'labor dispute' because of the fact that none of the officers or members of the defendant union have any contractual relations with the plaintiffs, and none of the 'disputants stand in proximate relation of employer and employee.' If the applicability of the statute were otherwise doubtful, such doubt would be removed by a consideration of the following language in the report of the House Committee on the Judiciary (H. R. Report 669, 72d Congress, First Session) favorably reporting the bill (H. R. 5315) a few days before its passage: • • •"

In the **Wallace** case, supra, referring to the Oregon Anti-Injunction Law, the Court said:

> "• • • The definition of a labor dispute is so broad and comprehensive that it undoubtedly extends the scope of the Clayton Act as interpreted by the United States Supreme Court by placing a greater restriction upon courts in the matter of issuing injunctions. We are convinced that the immunity from injunctions clearly extends to disputes between persons engaged in the same industry or craft who have a 'direct or indirect' interest therein, and is not limited to a dispute between an employer and his immediate employees. The Act provides that an association of employees has an interest in a labor dispute,

> **'regardless of whether or not the disputants stand in the proximate relation of employer and employee.'** If there were any doubt as to the intention of Congress in enacting the Norris-La Guardia Act it ought to be removed by the following language on the Report of the House Committee on the House Judiciary favoring the passage of the bill: • • •.'' (See appendix.) (Emphasis ours.)

The appellant, however, insists that to apply the provisions of the Code to the facts in the instant case is to deprive him of his property without due process of law, and to deny to him the equal protection of the laws. In support of this position reliance is placed on the cases of **Truax v. Corrigan,** 257 U. S. 312, and **Coppage v. Kansas,** 236 U. S. 1.

The **Truax** decision rested on two propositions: (1) The acts alleged in the complaint and admitted by demurrer were acts which were tortious in and of themselves—their tortious character lay not in the purposes toward which they were directed, and (2) since those acts were tortious it was held that to deprive the employer of a remedy by injunction against such tortious acts was to deprive the employer of equal protection of the laws, and to deprive him of his property without due process of law. The United States Supreme Court held that where certain actions were tortious per se it would be a violation of the Fourteenth Amendment and not a valid exercise of the state police power to deny to the complainant its right of remedy by injunction. The Court did not hold, however, that where labor disputes are involved an act restricting the power of courts to issue injunctions against peaceful acts was an unconstitutional deprivation of property, or a denial of equal protection of the laws.

In the instant case, after a trial on the merits, the Court

found that the only tortious acts consisted of a proposed secondary boycott, which the defendants, through their counsel, agreed to withdraw, and to cease further activities in that direction. Since the act requires that the Court shall be satisfied that the unlawful acts complained of "will be executed or continued unless restrained" (Sec. 103.56, Wis. Stats.), the Court, both under the act and under the general principles of equity, being satisfied that such acts will not be continued, did not issue an injunction. This ruling of the trial court was affirmed by the court of last resort in Wisconsin, Justice Fairchild saying:

> "It appears when issue was first joined between the parties, considerable spirit was manifested on both sides, and evidently acts occurred calculated to intimidate appellant and bring about a secondary boycott. The trial court said:
>
> > " 'That because of their statements made by their counsel in open court and in their presence, that they will not send any more letters to owners, contractors, or architects, as hereinbefore referred to, and will not indulge in any of the acts or conduct referred to in said letters, the court concludes that no unlawful act will be committed or will be executed or continued.'
>
> "The discretion of the trial court in determining that there is no occasion for a restraining order in the particular suggested is well within the scope of duties imposed on it. We are of the opinion that no occasion exists for overruling the lower court in this particular, and in other respects the judgment is approved."

Also, in the case of **United Chain Theatres v. Philadelphia M. P. M. O. Union**, 50 Fed. (2d) 189, in referring to the issuance of an injunction against certain acts, which

acts counsel for the defendants advised the Court would not be continued, the Court said:

> "Specifically, in the regard to the matter just referred to, my finding is that the conduct criticized has been discontinued, and there is no reason to apprehend that it will be resumed."

It must also be pointed out that the case of **Coppage v. Kansas**, supra, relied upon by the appellant to confer jurisdiction on this Court, is one involving a state statute which imposed criminal penalties on employers and did not involve anti-injunction statutes patterned after the Norris-LaGuardia Act.

As was said in the case of **Starr v. Laundry and Dry Cleaning Workers**, supra:

> "The **Coppage case** construes laws making it a criminal offense for an employer to enter into a contract with an employee containing a clause to the effect that the employee will refrain from joining a labor union during the term of his employment. The question of striking by employees is not involved. Neither is the question of picketing nor the propriety or legality of statutory provisions prescribing procedure in cases wherein injunctive relief is sought.
>
> "To attempt to impute criminality to an act that is sanctioned by the Constitution is obviously different from prescribing a special procedure to be followed to obtain injunctive relief in a special class of cases."

In this connection we also refer the Court to the case of **Texas & N. O. R. Co. v. Brotherhood of Railway Clerks**, 281 U. S. 548, 74 L. Ed. 1034. This is the most vital decision on the subject of constitutionality of labor legislation since the case of **Truax v. Corrigan**, supra. In the light of this decision, decided May 26, 1930, all legisla-

tion on the subject of labor disputes where constitutional questions are involved, must be approached with a recognition that the **Adair** and **Coppage** cases were effectively limited, if not made entirely innocuous. The Court said:

> "The legality of collective action on the part of the employees in order to safeguard their proper interests, is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing with redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work.
>
> American Steel Foundries v. Tri City Central Trades Council, 257 U. S. 184, 209, 66 L. ed. 189, 199, 27 A. L. R. 360, 42 Sup. Ct. Rep. 72.
>
> • • • • • • •
>
> "Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees instead of being an invasion of the constitutional right of either was based on the recognition of the rights of both. The petitioners invoked the principles declared in Adair v. U. S., 208, 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, and Coppage v. Kansas, 236 U. S. 1, 59 L. ed. 441, L. R. A. 1915 C 960, 35 Sup. Ct. Rep. 240, but these decisions are inapplicable. The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers, but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the act have no constitutional right to interfere with the freedom of employees in making their selections, they cannot complain of the statute on constitutional grounds."

Thus, by a unanimous court, this Court has committed itself to the recognition of the rights of organized labor to a degree which, as a matter of policy and legal principles, is applicable to the case at bar.

II.

THE FINDINGS OF BOTH THE TRIAL AND THE APPELLATE COURT AS TO THE PURPOSES AND REASONABLENESS OF THE DEMAND ARE FINDINGS OF FACT. SUCH FINDINGS ARE NOT REVIEWABLE BY THIS COURT. UNDER SUCH FINDINGS OF FACT NO FEDERAL RIGHT HAS BEEN DENIED TO THE APPELLANT.

However, it is asserted here that, while the Act standing alone may be constitutional, it is invalid if construed so as to apply to the facts in the instant case. It is asserted that the demand made upon the appellant is unreasonable, and that to refuse to enjoin the otherwise legal acts by the union directed to the enforcement of such demand is to deprive the appellant of his constitutional rights.

It is the respondents' contention that the findings of both the trial and appellate courts as to the reasonableness and purposes of their demand being findings of fact, it is not within the purview of the jurisdiction of this Court to review such findings. The findings of fact are set out in the transcript of the record at pages 24 to 29. We take the opportunity to set out what we consider to be the most pertinent paragraphs thereof:

> "12. That the agreement entered into by the defendants with other tile contractors in the city and county of Milwaukee is a collective agreement governing wages, hours and working conditions for their

members who are journeymen and journeymen helpers recognized as craftsmen in accordance with the Constitution of the defendant organizations.

"13. That all contractors who have entered into such agreement with the defendant unions are classed by the defendants as union contractors, and that all contractors who have refused to enter into said agreement are classed by the defendant unions as nonunion contractors.

"14. That by virtue of the agreement between the defendant unions and the union contractors, the defendant unions and their members secure advantages in wages, hours and working conditions in maintaining a standard of wages and working conditions satisfactory to the defendants and their membership; that the wages paid to the defendants and their members by union contractors have for some time been higher than the wages paid by the plaintiff to his employees.

"15. That the tile industry for some years last past has been in a demoralized state because of a lack of building operations; that the defendants and their members have been in competition with nonunion tile setters and helpers in their effort to secure work as a means of livelihood; that for the purposes of enhancing the interests of the defendants and their members, the defendants and their members have found it necessary for the protection of their individual rights in the prosecution of their trade, to require of all employers agreeing to conduct a union shop to agree: 'That no individual, members of a copartnership or corporation engaged in the tile contracting business shall work with the tools or act as helper, but that the installation of all materials within the classification of tile work shall be done by journeymen members of the Tile Layers Protective Union.'

"16. That the plaintiff, by virtue of his status of an employer and contractor, is not entitled to member-

ship in the defendant unions; that the Constitution and Rules of the (fol. 93) defendant unions require among other things that a tile setter shall be a journeyman tile setter who shall have acquired his practical experience by virtue of an apprenticeship, and that such apprenticeship shall, among other things, consist of service as an apprentice of not less than three years; that the plaintiff has not served an apprenticeship as a tile setter in accordance with the rules of the defendant unions.

"17. That the picketing has been peaceful, without violence, and without any unlawful acts."

We also point out that the decision of the Wisconsin Supreme Court, appearing in the transcript of record, pages 116 to 122, affirms these findings at page 120:

"The demand here by the unions is for the appellant to conform to a definite wage scale prevalent on union jobs, and to conform to a fixed number of hours approved by the union. They also insist that he conform to the rules of apprenticeship and other working conditions prevalent in the industry where union rules prevail. The requirement that the employer personally refrain from working with the tools of the trade is important and vital to the craftsmen affiliated with defendant unions, because the practices sought to be prevented can so readily affect wages and hours of labor. It is pointed out by respondent that the membership in the union has decreased during the depression years, and that as a necessary requisite for a proper existence and livelihood, these craftsmen find it necessary to require employers to comply with the terms of Article III. Appellant's method of conducting his business brings into the situation a direct attack by him upon the means relied upon by the unions to protect their scale of wages, hours and working conditions against the cutting of prices and lengthening of hours of work."

That the above are findings of fact and not conclusions of law cannot be disputed. As was held in the case of **W. A. Snow Iron Works v. Chadwick**, 227 Mass. 382, L. R. A. 755, 116 N. E. 801, the object or motive of a strike is a question of fact.

We believe that it is axiomatic that the United States Supreme Court will not disturb the findings of fact of the State Supreme Court, and that such findings are conclusive upon the Court; that this Court will not entertain jurisdiction to determine a case which is based upon such findings.

Findings of fact by a state trial court that the inspection of gasoline provided for by state statute protects the community from frauds and promotes the public safety, are accepted as conclusive by the Federal Supreme Court on writ of error. **Pure Oil Co. v. Minnesota**, 248 U. S. 158, 39 Sup. Ct. Rep. 35, 63 L. Ed. 180.

Findings of fact are binding unless ascertained to be without support in evidence. **Ward & Gow v. Krinski**, 259 U. S. 503, 42 Sup. Ct. Rep. 529, 66 L. Ed. 1033.

Findings of a court supported by substantial evidence will not be disturbed on appeal. **Borden Products Co. v. Ten Eyck**, 297 U. S. 251, 56 Sup. Ct. Rep. 453, 80 L. Ed. 669.

Findings of fact in which two lower courts concur will be accepted by the Supreme Court unless clear error is shown:

Texas & N. O. R. Co. v. Brotherhood of Railway & S. S. Clerks, 281 U. S. 548, 50 Sup. Ct. Rep. 422, 74 L. Ed. 1034;

U. S. v. Commercial Credit Co., 286 U. S. 63, 52 Sup. Ct. Rep. 46, 76 L. Ed. 978;

Continental Illinois National Bank & Trust Co. v. Chicago R. I. & P. R. Co., 294 U. S. 648, 55 Sup. Ct. Rep. 595, 79 L. Ed. 110.

If it appears that the decision of the federal question was so plainly right as not to require argument, the writ should not be allowed. **Re Spies**, 123 U. S. 131, 7 Sup. Ct. Rep. 22, 31 L. Ed. 80; **Re Bordman**, 169 U. S. 39, 18 Sup. Ct. Rep. 291, 42 L. Ed. 653.

The Federal Supreme Court upon a writ of error to a state court has no right to review the decision upon the ground that the finding was against the evidence or the weight of evidence. **Thayer v. Spratt**, 189 U. S. 346, 23 Sup. Ct. Rep. 576, 47 L. Ed. 845.

Whatever was a question of fact in the state court is a question of fact on writ of error from the Federal Supreme Court to that court. **Hanley v. Donoghue**, 116 U. S. 1, 6 Sup. Ct. Rep. 242, 29 L. Ed. 535.

The findings of fact are conclusive upon the Federal Supreme Court on writ of error to a state court, in ordinary cases other than those arising under the contract clause of the Federal Constitution, unless there is a ground for insistence that a federal right has been denied as a result of a finding that is without support in the evidence. **Interstate Amusement Co. v. Albert**, 239 U. S. 560, 36 Sup. Ct. Rep. 168, 60 L. Ed. 439.

A finding of fact by an inferior state court affirmed in the highest court of that state by a divided court is conclusive on the Federal Supreme Court in reviewing a judgment of the highest state court. **Minneapolis Railway Co. v. Minnesota**, 193 U. S. 53, 24 Sup. Ct. Rep. 396, 48 L. Ed. 648.

It is true that in the **Truax** case the United States Supreme Court was held to have the right to examine the facts and to determine whether the findings are without or with substantial support. But it must be remembered that in that case the defendants demurred to the complaint, thereby admitting the truth of the alleged facts; and the Court found that the acts which were admitted by demurrer were illegal per se, having consisted of "libelous attacks" and "abusive epithets." In that case it was held that the undisputed facts were necessary to a determination of the issue as presented, and it was apparent that the Supreme Court of Arizona ignored the admitted facts in coming to its conclusion. But in the instant case a trial was had on the merits. The Court found that those acts which were questionable would no longer be persisted in; all other acts of respondents were associated with picketing, and as to those acts the Court found that "the picketing has been peaceful, without violence, and without any unlawful acts."

It is apparent from the record and the decision that the facts relating to the time and manner of picketing are not issues in this case. The issues in the appellate court and the decision were confined to consideration of whether the peaceful picketing was to be free from injunctive restraint in view of the type of demand made upon the appellant.

The proper answer to this question rested upon a determination of whether the acts arose out of a malicious desire to interfere with plaintiff's right to work, or whether they were reasonably directed to the objects and purposes for which laboring men are allowed to organize. The Court's finding that the latter was the purpose is not attacked or disputed. It is the appellant's position that if acts in furtherance of respondents' rights affect adversely his right to work, and to conduct his business as he sees

fit, then respondents' conduct is per se illegal. Such position, of course, is utterly inconsistent with the prior adjudications of this Court.

In the **Truax, Duplex** and **Tri-City cases** this Court affirmed the proposition that peaceful picketing and persuasion, when directed toward the legitimate objectives and purposes for which working men organize, and when conducted in a legal and orderly manner, are properly free from restraint. In the absence of unlawful means it is the purpose toward which the organization's activities are directed that must be determined. If such purposes and objectives bear no direct relationship to the needs of the workingmen and to improve their standards of living, wages, hours and conditions of employment, then their actions may properly be restrained. However, if the purposes are directed towards improvement of working conditions, then the peaceful activities are lawful, and the resultant hardships, if any, to the employer become damnum absque injuria.

In the instant case the Supreme Court of Wisconsin reaffirmed this proposition (R. 120-122):

> "The respondents, by the use of the practice of picketing, seek to induce the appellant to abandon his methods and to conform to the union rules. The distinctions between one engaged in the tile setting business and one working as a journeyman or helper is apparent, and if the proposed contract is entered into by appellant, he will bind himself to respect the union classifications and distinctions. Appellant has declined to sign the suggested contract unless there be eliminated therefrom the provisions which require him to desist from working with his tools and his helping generally in the work of installing material. Respondents insist that the particular rule to which ap-

pellant objects is one in the furtherance of the legitimate interests of the members of the unions. In view of our decision in the American Furniture Co. case, supra, and the cases there analyzed in the opinion written by Mr. Justice Wickhem, it is apparent that, under the laws of Wisconsin, where the primary purpose of the acts complained of is to protect and improve the condition of those whom the unions represent, such action is justifiable, because it tends to promote the welfare of the members of the union engaged in the same craft. There is no effort to induce or compel the appellant to do any unlawful thing. If it be assumed that appellant cannot operate his business successfully upon the conditions insisted upon by the respondents, still no right of appellant now protected by law is invaded by respondents' efforts to bring appellant's business to union standard. American Furniture Co. v. I. B. of T. C. and H. of A. Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, supra, and cases there cited. No question exists as to appellant's right to conduct a non-union shop under any terms he chooses. An economic contest has developed. Each of the contestants is desrious of the advantage of doing the business in the community where he or they operate. He is not obliged to yield to the persuasion exercised upon him by respondents.

"The Legislature, in outlining the public policy of this state, has precluded him from an appeal to the courts for assistance until some unlawful act has become imminent, or something has occurred to start in motion the administration of equity rules, or the performance of the duties of policing. The respondents do not question that it is appellant's right to run his own business and earn his living in any lawful manner which he chooses to adopt. What they are doing is asserting their rights under the acts of the Legislature for the purpose of enhancing their opportunity

to acquire work for themselves and those whom they represent. **The nature of the controversy is one in which the court and law-enforcing officers can have no interest other than to preserve the equality of each contender before the law, and to require that each refrain from doing any unlawful act. Courts, though differing as to the allowable scope, pretty generally agree that picketing is a legitimate means of economic coercion, if it is confined to persuasion and is free of molestation or threat of physical injury or annoyance.** Frankfurter & Green, The Labor Injunction, p. 31.

"The respondents' act of peaceful picketing is a lawful form of appeal to the public to turn its patronage from appellant to the concerns in which the welfare of the members of the union is bound up. As stated by respondents' counsel in their brief, **'the public is free to accept or reject the appeal and the plaintiff is free to perform all work he can get in whatever manner he wishes to perform it.'** He may work long hours. He may bid for contracts at a low figure based on low wages for himself and on long hours. In the judgment of respondents, his conduct in this respect affects their opportunity of maintaining a standard of better wages, regulated hours, and improved working conditions, and the collision of the two sets of rights, the one in appellant, the other in the respondents, creates a labor dispute within the definition of the code (St. 1935, Secs. 103.51-103.63). Each appeals to public opinion. If the trade turns from one to the other as a result of this dispute, the injury is incidental, injuria absque damno." (Emphasis ours.)

This has always been the judgment of the United States Supreme Court, and has always been the view, with very few exceptions, of the great majority of states and lower federal courts. We refer the Court to the very extensive

note appearing in **71 L. Ed. 248**, in connection with the case of **Kansas v. Dorchy**, indicating that the following are proper and legitimate demands of workingmen's associations and bear direct and reasonable relationship to the purposes for which they are allowed to organize:

Payment of wages during working hours; rates of wages payable by outside contractors; hours of labor; statement of working records; amount of work required; piecework; enforcement of contract rights; arbitration; method of enforcing agreements; enforcing negotiations; retention of obnoxious employees; number of apprentices; amount of help to be employed; reinstatement of employees; closed shop; collective bargaining. Of course, these are not all.

As was stated in the case of **New Jersey Painting Company v. Local 26**, 96 N. J. Eq. 632, 126 Atl. 399, 47 A. L. R. 384:

> "Economically, the conclusion reached by the lower court confuses the possible or probable effect of the defendants' action upon the employers with the defendants' rights. The law gives the defendants a right to sell their labor to whom they please, when and under such conditions as they may fix, individually or in combination. They may make rules and regulations passed in good faith, providing for what they deem to be an economic advantage to themselves. If in the enforcement of such rules and regulations they violate no law, but act solely for the declared purpose, the courts ought not and cannot legally enjoin them from such concerted action, simply because such action may affect some employers. • • •"

And in **Exchange Bakery & Restaurant v. Rifkin**, 245 N. Y. 260:

> "The purpose of a labor union to improve the con-

ditions under which its members do their work, to increase their wages, to assist them in other ways, may justify what would otherwise be a wrong. So would an effort to increase its numbers and to unionize an entire trade or business. It may be as interested in the wages of those not members, or in the conditions under which they work, as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages. All, by the principle of collective bargaining. Economic organization today is not based on the single shop. Unions believe that wages may be increased, collective bargaining maintained, only if union conditions prevail, not in some single factory, but generally. That they may prevail, it may call a strike and picket the premises of an employer with the intent of inducing him to employ union labor. And it may adopt either method separately. Picketing without a strike is no more unlawful than a strike without picketing. Both are based upon a lawful purpose. Resulting injury is incidental and must be endured."

The question then is one of fact, to be determined by the triers of fact in the state courts, whether by judge or jury. In the instant case the Court has found:

1. That the means used were peaceful and lawful and without fraud, violence, or breach of the peace, and

2. That those lawful acts were directed toward the proper protection of the members' legitimate interests.

Under such findings, fully supported by the evidence, both under the law as it existed prior to the adoption of a labor code, and under the labor code, the appellant here is not entitled to the injunctive relief which was sought.

It is apparent, then, that this appeal is now sought and the jurisdiction of this Court is now invoked in order that

this Court make findings of fact as to motives and purposes contrary to the findings in the state courts. We must respectfully submit that such determination is not the proper function of this Court, and that the record is not now subject to such attack. The findings were made after due and proper trial, all the facts having been submitted and litigated. Such findings are now binding and not subject to review.

III.

SINCE IT IS ADMITTED THAT THE APPELLANT IS NOT A QUALIFIED CRAFTSMAN ACCORDING TO THE UNION RULES AND CONSTITUTION AND WOULD NOT BE ENTITLED TO MEMBERSHIP IN THE UNION, THE FURTHER RULE THAT UNION CRAFTSMEN MAY NOT WORK WITH NONUNION OR UNQUALIFIED CRAFTSMEN JUSTIFIES THE TERMS OF THE PROPOSED CONTRACT. SUCH UNION RULES AND REGULATIONS ARE NOT WITHIN THE JURISDICTION OF THIS COURT FOR THE PURPOSES OF REVIEW.

There is another reason why the Court should not take jurisdiction in this case; that is, the appellant was unqualified to work with the respondent union members because of a rule of the union which provides that:

> "Members of the I. U. shall not accept employment with a contractor who works with the tools of the trade unless said contractor is a practical bricklayer, stonemason, cement mason, plasterer, marble mason, tile setter, mosaic or terrazzo worker.
>
> "This section shall be inserted in all subordinate unions' by-laws." (Article XX, Sec. 6, Constitution and Rules of Order.) (R. 39.)

A "practical tile setter" is one who has served an apprenticeship as provided by the union constitution and by-laws. The above provision was asserted by the respondents as being a pertinent issue in the case (R. 39, 66, 67, 77, 79). It was stated unequivocally that under no circumstances could they permit the members to work with Senn, because he was not a qualified craftsman. It was not denied by appellant that he had not served the appranticeship or received the training required by the by-laws of the union, which apprenticeship and training the union deemed necessary before one could be considered a qualified, skilled craftsman or a competent mechanic so as to permit union members to work with him. As a matter of fact, counsel for the appellant stipulated to this effect (R. 68).

With reference to this question the trial court made findings of fact as follows:

> "16. That the plaintiff, by virtue of his status of an employer and contractor, is not entitled to membership in the defendant unions; that the Constitution and Rules of the defendant unions require among other things that a tile setter shall be a journeyman tile setter who shall have acquired his practical experience by virtue of an apprenticeship, and that such apprenticeship shall, among other things, consist of service as an apprentice of not less than three years; that the plaintiff has not served an apprenticeship as a tile setter in accordance with the rules of the defendant unions."

The Supreme Court of the State of Wisconsin, in affirming the decision of the trial court, said:

> "• • • The demand here by the unions is for the appellant to conform to a definite wage scale prevalent

on union jobs, and to conform to a fixed number of hours approved by the union. **They also insist that he conform to the rules of apprenticeship and other working conditions prevalent in the industry where union rules prevail.** The requirement that the employer personally refrain from working with the tools of the trade is important and vital to the craftsmen affiliated with defendant unions, because the practices sought to be prevented can so readily affect wages and hours of labor. It is pointed out by respondent that the membership in the union has decreased during the depression years, and that as a necessary requisite for a proper existence and livelihood these craftsmen find it necessary to require employers to comply with the terms of Article III. Appellant's method of conducting his business brings into the situation a direct attack by him upon the means relied upon by the unions to protect their scale of wages, hours and working conditions against the cutting of prices and lengthening of hours of work." (Emphasis ours.)

It has been the consistent holding of the lower courts that since labor unions have the right to make rules governing their trade and for the benefit of their craft, they have the right to set up qualifications for membership, and they can make rules for the admission of new members and restrict the membership as may best promote their interests. In adhering to apprenticeship qualifications the union is not arbitrary or capricious. The rules relating to apprenticeship are the result of a long and wide experience in that particular field. The conclusion drawn from this experience and knowledge was that certain training is necessary in order to fully qualify a man to be a skilled mechanic. The work of practical tile setting requires a high degree of skill. This skill can be acquired

only after many years of apprenticeship, training and observation of the actual work of a competent craftsman. We refer the Court to the testimony appearing at page 95 and pages 100 to 102 of the record. Apprenticeship statutes and rules are the oldest recognized method of regulation contributing to the maintenance of fair wage standards. A three-year term of apprenticeship in any of the skilled crafts in the building trades has been a requirement for over half a century. Generally, the apprenticeship rule has been recognized and enforced in England since 1688. Webb, History of Trade Unionism, pages 42 and following.

In **Mayer v. Journeymen Stone Cutters Union**, 47 N. J. Eq. 519, 20 Atl. 492, a case involving an action brought by two individuals for membership in a union, it was said:

> "These organizations are formed for purposes mutually agreed upon. Their right to make by-laws and rules for the admission of members and the transaction of business is unquestionable. They may require such qualifications for membership and such formalities for election as they choose. They may restrict membership to original promoters or limit the number to be thereafter admitted. The very idea of such organizations is association mutually acceptable, or in accordance with regulations agreed upon; a power to require the admission of a person in any way objectionable to the society is repugnant to the scheme of its organization. While courts have interfered to inquire into and restrain the action of such societies in the attempted exclusion of persons who have been regularly admitted to membership, no case can, I think, be found where the power of any court has been exercised, as sought in this case, to require the admission of any person to original membership in any such voluntary association. Courts exist to protect rights, and where the right has once attached

they will interfere to prevent its violation, but no person has any abstract right to be admitted to such membership; that depends solely upon the action of the society, exercised in accordance with its regulations, and until so admitted no right exists which the courts can be called upon to protect or enforce.

* * * * * * *

"These considerations result in the conclusion that this court has no jurisdiction to grant the relief prayed for, and that the bill must be dismissed."

In the case of **Snow v. Wheeler**, 113 Mass. 179, the Court quotes approvingly from the earlier case of **Carew v. Rutherford**, 106 Mass. 1, 14, wherein it was said:

"Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can. * * * He may refuse to deal with any man or class of men, and it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price, or without certain conditions."

In the **Snow** case, supra, the Court further says:

"In the case at bar there is no evidence offered by the documents submitted to us that the purposes of this association are unlawful by the rules stated. Unlawful coercion certainly does not appear to be intended, and the right of the members to instruct whom they choose in the mysteries of their trade cannot be denied. The case presented is not one where there is evidence to justify us in finding that the objects and purposes of the association are fraudulently and colorably declared as a cover for a secret unlaw-

ful agreement of its members. It will be time enough to deal with such a case when it arises,"

In the case of **N. J. Painting Co. v. Local 26**, 96 N. J. Eq. 632, 126 Atl. 399, 47 A. L. R. 384, it was held that a clause in the constitution of a labor union which provides that "where there is a difference between the wage scale of two cities, all members employed upon a job in one of the two cities by an employer from the other • • • shall receive the higher of the two wage scales," is not illegal as creating an unfair discrimination or an unfair restraint of trade. The Court held that such clause may be enforced by a voluntary combination since the prime object of the rule is to establish a standard of wages.

As to the rights of an organization of laboring men to strike and picket because there are nonunion men working on the job, or because the doing of certain work by certain men is in violation of union rules, there can be no question. In **Pickett v. Walsh**, 192 Mass. 572, 78 N. E. 753, the Supreme Court of Massachusetts held that a combination of workmen can refuse to work when the pointing of bricks is given to others than the members of the organization who lay the bricks. The Court says that the "fact that the employers are forced to do what they do not want to do is not decisive of the legality of the union's acts" and "the fact that the business of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the legality of the acts.

There is an abundance of cases in the lower federal and state courts sustaining the right of organizations of workingmen to strike or picket, or to do both, when the conditions under which they work are inimicable to their best interests. This is also true when they are requested

to work with men who are not members of their organization or are not eligible for membership therein. The following are just a few of such cases:

Scott Stafford Opera House Co. v. Minneapolis Musicians Association, 118 Minn. 410, 136 N. W. 1092;

Empire Theatre Company v. Cloke, 53 Mont. 183, 163 Pac. 107;

Cohn & Roth Electric Co. v. Brick Layers, Masons and Plasterers Local Union, 92 Conn. 161, 101 Atl. 659;

Parkinson v. Building Trades Council, 154 Calif. 581, 90 Pac. 1027;

Rhode Bros. v. Musicians Protective Union, 37 R. I. 281, 92 Atl. 641;

National Fireproofing Company v. Mason Builders Ass'n, 169 Fed. 259;

Wabash Railway Company v. Hanahan, 121 Fed. 163;

Purvis v. Local No. 500, 214 Pa. 348, 63 Atl. 585;

Kemp v. Amalgamated Ass'n of Street Railway Employes, 255 Ill. 241, 99 N. E. 388.

It thus can be readily seen that union rules and regulations as to membership, and rules that its members shall not work with anyone who is not a "practical craftsman" are not subject to review nor can relief be had therefrom in any court of the United States. This is especially true where, as in this case, the rule is promulgated on reasonable grounds. The fact that appellant is not a "practical craftsman" and therefore union men are not permitted to work with such unqualified mechanic, are disabilities distinctly personal to the appellant. According to the rules and constitution of the respondent union the appellant was disqualified to work with the tools of the trade in so far as the union is concerned; and the union members were dis-

qualified from working with him as an employer since he was not a skilled craftsman. In order, therefore, for appellant to secure a union contract he would be obliged to agree not to work with the tools of the trade. If he persists in working with the tools of the trade, thus refusing to accede to the union request, it is within the rights of the union to advertise to the world that he is a nonunion contractor, and to engage in the acts which have always been declared lawful and which are declared lawful under the act. The failure to restrain those lawful acts in furtherance of such dispute does not deprive the appellant of any rights under the Constitution or laws of the United States or the State of Wisconsin, regardless of the existence of the Wisconsin Labor Code or similar enactments.

CONCLUSION.

It is respectfully submitted that the United States Supreme Court has no jurisdiction in this case, nor can it allow this appeal for the purposes of reviewing the decision of the Supreme Court of the State of Wisconsin, because there is no federal question involved here. The Wisconsin Labor Code is a jurisdictional enactment. Within the proper exercise of the police power of the State Legislature, the Code provides for a certain procedure to be taken in cases growing out of involving labor disputes. Further than that, the federal question which it is claimed is involved in this case has been decided adversely to the appellant by this Court, and for that reason it is no longer a substantial one. This Court cannot entertain jurisdiction for the further reason that the only purposes for which such jurisdiction is invoked now is to disturb the findings of fact made by the Wisconsin

Supreme Court, which findings of fact are amply supported by the record. Under such findings, since it has been determined that the acts complained of are peaceful ones, and also determined that such acts are for the legitimate purpose of furthering the interests of defendant unions and not for the purpose of maliciously interfering with the plaintiff's rights, it is clear that the question has been decided adversely by this Court in prior cases. Also, this Court should not take jurisdiction in this matter because the refusal on the part of the defendants to enter into a contract with the appellant is based on a rule of the defendant unions that its members shall not work with a person, be he employer or journeyman, who has not served an apprenticeship, entitling him to be classed as a "practical craftsman." Rules of apprenticeship are reasonable, and such rules and regulations are not subject to judicial interference.

Respectfully submitted,

JOSEPH A. PADWAY,
Attorney for Respondents.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936.

No. 658.

PAUL SENN,

Appellant,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL NO. 5, CHARLES SCHREIBER et al.,

Respondents.

Appeal from the Supreme Court of the State of Wisconsin.

APPENDIX TO RESPONDENTS' BRIEFS.

JOSEPH A. PADWAY,
Counsel for Respondents.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CE ntral 4477.

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AMERICAN FURNITURE CO. v. I. B. OF T. C. AND H. OF A., CHAUFFEURS, TEAMSTERS AND HELPERS GENERAL LOCAL NO. 200 OF MILWAUKEE ET. AL.

SUPREME COURT OF WISCONSIN.

June 29, 1936.

Appeal from a judgment of the Circuit Court for Milwaukee County; Daniel W. Sullivan, Judge.

Affirmed. (Fairchild, Fowler, and Nelson, JJ., dissenting.)

This was an action commenced on September 11, 1935, by American Furniture Company against I. B. of T. C. and H. of A., Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee, Wis., Joseph F. Scislowski, William Nagorski, Furniture Sales and Servicemen's Union Local 1342, Alex. H. Kolbing, and Philip F. Koerner, in which an injunction was sought restraining the picketing by defendants of a retail furniture store owned and operated by plaintiff in the city of Milwaukee. The action was tried to the court upon a stipulation of facts. Findings of fact and conclusions of law were duly made and entered, and a judgment entered in accordance with the findings and conclusions on December 19, 1935. By the terms of this judgment, it was decreed that the Wisconsin Labor Code, sections 103.51-103.63, inclusive (formerly numbered sections 268.18-268.30, inclusive), is constitutional and valid; that the action involves a labor dispute within the meaning of section 103.62 (formerly section 268.29), Stats., and that the Wisconsin Labor Code is applicable thereto; that the prayer of the complaint to prohibit all picketing of plaintiff's store and all persuasion of persons

to refrain from dealing with plaintiff and from representing that plaintiff is unfair to organized labor be denied; that defendants are restrained from employing more than four pickets; from so picketing as to interfere with rights of customers to have free ingress and egress from plaintiff's store; from intimidating customers of plaintiffs or the public who may become customers; from displaying to customers and other people signs or banners stating that plaintiff is unfair to organized labor or unfair to the defendant unions, unless the banners also fairly state in immediate connection therewith the essential facts of the labor dispute; from stating orally or in writing or printing to the public the same matters unless accompanied by the same exposition of the facts; and from in any manner publishing or representing that there is a strike at plaintiff's store.

Plaintiff appeals. Defendants filed a motion to review such portions of the judgment as impose restraints upon defendants. This motion, however, has been abandoned, and defendants make no effort to sustain it either in brief or oral argument.

The material facts will be stated in the opinion.

Wickhem, Justice.

The facts in this case are not in dispute, and the questions presented are two: (1) Upon the facts presented, was there a labor dispute as defined in subsection 3 of section 103.62 so as to bring the activities of defendants within the protection of the Wisconsin Labor Code and render lawful picketing of plaintiff's store by defendants? (2) If so construed, is the labor code to that extent unconstitutional, (1) as denying due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Federal Constitution, and (2) as invalidly limiting the jurisdiction of the circuit court in violation of sections 1, 9, and 22 of article 1, and sections 2 and 8 of article 7 of the Constitution of Wisconsin.

It now becomes convenient to state briefly the facts as set forth in the stipulation.

Plaintiff is a corporation engaged in the retail furniture business. Its employees include seventeen men who are workers in the crafts represented by defendant unions. None of the seventeen employees are members of the defendant unions. Many of these employees have been employed by plaintiff continuously for ten or more years. On July 15, 1935, defendant Koerner, business agent of defendant Local 1342 Furniture Sales and Service Men's Union, communicated to plaintiff a request that plaintiff execute certain contracts affecting the labor relations of plaintiff's employees in the crafts represented by the union. The proposed contracts involve the following agreements on the part of the employer:

(1) Recognition of the unions as bargaining agents in matters of wages, hours, and working conditions for the respective crafts; (2) the payment of a wage scale included in the agreement; (3) regulation of hours and holidays. Other details of the relationship such as vacations with pay, the seniority rule with respect to lay-offs, an agreement that the employer will not, during the term of the contract, attempt to persuade any employee not to join the union and other matters were covered by this proposed agreement. The president agreed to submit the matter to the directors, but expressed some doubt as to the disposition of the company to sign the contract, whereupon Koerner stated that unless the contracts were signed the unions would picket the store. The officers of plaintiff brought the demands of the union to the attention of the seventeen employees affected by the contracts. These employees thereupon took a secret ballot on the question whether they desired to join one of the defendant unions and unanimously voted against so joining. The result of the vote being communicated to the representatives of the union, Koerner insisted that plaintiff require the employes to join one of the unions, and upon their refusal, the unions would

furnish men to fill their places from its members or from men who were willing to join unions. One of the officers of plaintiff then stated that plaintiff company had no objection to the men joining the union, but did not feel it proper to bring pressure upon the men to join since that was a matter which should be left to the employees to decide; that if the defendant unions desired to induce the employees to join and the men were willing to do so, there would be no objection on the part of the plaintiff. Several days thereafter, representatives of the union expressed doubt whether the vote previously taken was the free expression of the employees. As a result, the employees were requested to reconsider their answer, and representatives of the plaintiff told the employees that they were perfectly free to do as they desired, and that whatever course they took would be satisfactory to the company. The vote was again taken and resulted in a unanimous decision not to join the union and in an expression of satisfaction with their services, labor conditions, and relations with their employer. Plaintiff elected to abide by the employees' decision and declined to sign the contracts.. On September 3, 1935, picketing of plaintiff's store took place. The character of the picketing need not be discussed since defendants have abandoned their motion to review, and plaintiff's appeal is based on a contention that, under the facts as presented, picketing in any form is not permitted by the code.

Upon these facts, the question is squarely presented whether there was a labor dispute involving plaintiff and defendants in view of the fact (1) that no employee of plaintiff was a member of defendant unions; (2) that none desired or was willing to become a member; (3) that the employees were wholly satisfied with the conditions of their employment; (4) that the employees opposed the execution of the contracts proposed for plaintiff's execution; (5) that plaintiff has been unwilling to coerce its employees to join the unions and has throughout been willing to take such position in that respect as its employees desired.

Section 103.62 (3) reads as follows:

> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *or concerning employment relations, or any other controversy arising out of the respective interests of employer and employe,* regardless of whether or not the disputants stand in the proximate relation of employer and employe."

The act of which this section is a part is substantially similar to the Federal Norris-LaGuardia Act (29 U. S. C. A. §§ 101-115). The italicized words in section 103.62 (3) are not contained in the Norris-LaGuardia Act as finally enacted by Congress, although this clause was in the act as originally introduced. Consideration must also be given to sections 103.62 (1) and (2) which read as follows:

> "When used in sections 103.61 to 103.63, and for the purposes of these sections:
>
> "(1) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in a single industry, trade, craft, or occupation; or who are employes of one employer; or who are members of the same or an affiliated organization of employers or employes; whether such dispute is (1) between one or more employers or associations of employers and one or more employes or associations of employes; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employes or associations of employes and one or more employes or associations of employes; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in subsection (3)) of 'Persons participating or interested therein' (as defined in subsection (2)).
>
> "(2) A person or association shall be held to be a person participating or interested in a labor dispute

if relief is sought against him or it and if he or it is engaged in the industry, trade, craft, or occupation in which such dispute occurs, or is a member, officer, or agent of any association of employers or employes engaged in such industry, trade, craft, or occupation."

Preliminary to a determination of the scope and meaning of the labor code, it is necessary to give some attention to precedent legislation and judicial decision. Prior to adoption of the code, the only legislation in Wisconsin dealing with injunction in connection with picketing activities was section 133.07, which was substantially equivalent to the Clayton Act (38 Stat. 730) covering the same general subject. See Monday Co. v. Automobile, Aircraft & Vehicle Workers, etc., 171 Wis. 532, 177 N. W. 867, where this court characterized section 133.07 as an attempt to engraft upon the laws of this state certain provisions of the Act of Congress commonly known as the Clayton Act.

Subsection 1 of the section provides that working people may organize and carry on labor unions for the promotion of their general interests as workers. Subsection 2 provides that no restraining order or injunction will be granted by any court of this state in any case between an employer and employees or between employers and employees, or between employees, or between persons employed and persons seeking employment involving and growing out of any dispute whatever concerning employment, unless necessary to prevent irreparable injury to property and for which there is no adequate remedy at law. Subsection 3 provides in substance that no such restraining order shall prohibit any person or persons, whether singly or in concert, from terminating the relation of employment and ceasing to work or advising or persuading others by personal means to doing so, or from peacefully persuading any person to work or to abstain from working or from ceasing to patronize or employ any party to such dispute and other enumerated actions. The only interpretation of section 133.07 by this court was in the Monday Case, supra. It was there held that a dispute over the

maintenance of a closed shop was not within the protection of section 133.07. Since the section in question is so similar to the Clayton Act, it is of some moment to consider the interpretation of the Clayton Act by the United States Supreme Court.

The principal case is that of Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 S. Ct. 172, 178, 65 L. Ed. 349, 16 A. L. R. 196. This was a suit in equity to restrain defendants from maintaining a boycott. Complainant was a manufacturing concern employing, among others, some 200 machinists. Defendants were the business agents of the machinists' union and the union itself. Plaintiff conducted an open shop without discrimination between union and non-union men. None of the defendants was or ever had been an employee of complainant, nor had the plaintiff been in any relationship whatever with the defendant unions. The union called a strike in plaintiff's factory as a result of which about 14 union machinists left complainant's employ. This, however, did not materially interfere with the operation of the factory. Defendants proceeded to warn customers that it would be better for them not to purchase or install presses made by complainant and to threaten them with loss if they did so; to threaten sympathetic strikes in other trades; to threaten a trucking company with trouble if it hauled presses manufactured by plaintiff; to incite employees of the trucking company to strike in order to interfere with the hauling and installation of presses; to demand that the repair shop do no work on Duplex presses; and to threaten union men with loss of union standing if they participated in the installation of such presses.

The lower court was of the opinion that these acts constituted an interference with interstate commerce subject to being enjoined unless the Clayton Act forbade this injunction. The principal question upon appeal was whether under section 20 of the Clayton Act (29 U. S. C. A. § 52), which is substantially subsection 2 of section 133.07, Stats., there was such authorization of defendant's conduct as to

require the conclusion that no injunction should issue. It was held that all of the provisions of section 20 are subject to a general qualification respecting the nature of the controversy and the parties affected. It was held that the restriction upon the use of the injunction was in favor only of those concerned as parties to such a dispute as the act describes. The court repudiated the conclusion of the Circuit Court of Appeals (252 F. 722) that the words "employers" and "employees" refer to the business class or clan to which the parties litigant belong, thus bringing within the operation of section 20 a dispute between the machinists' union or its members and the plaintiff, although these members stand in no relation to plaintiff. "Congress had in mind particular industrial controversies, not a general class war. 'Terms or conditions of employment' are the only grounds of dispute recognized as adequate to bring into play the exemptions." It was held that the action could not be regarded as bringing in all members of the labor union as parties to a dispute which proximately affected only a few of them.

The dissenting view was expressed by Mr. Justice Brandeis, who was of the opinion that defendants had a common interest threatened by plaintiff, and that it was legitimate for the union to refuse to handle materials, the production of which would weaken the standing and efficiency of the union in protecting the interest of its members. He expressed the opinion that the act as a whole gave no evidence of being restricted to legal relations between a specific employer and his employees and asserted that the majority opinion proved too much because it would automatically withdraw from the protection of the act the striker who by his very act of striking terminated his employment.

In the case of American Steel Foundries v. Tri-City Central Trades Council et al., 257 U. S. 184, 42 S. Ct. 72, 66 L. Ed. 189, 27 A. L. R. 360, which followed the Duplex Case, supra, the facts were as follows:

Plaintiff was a corporation operating a factory for the

manufacture of steel products. It sought to enjoin the Tri-City Trades Council and 14 individual defendants, some of whom were officers of the council, from conspiring to prevent plaintiff from obtaining and retaining skilled laborers in its plant. It was charged that the conspiracy was executed by organized picketing accompanied by threats, intimidation, and violence, against persons employed or seeking employment with plaintiff. Defendants admitted picketing for the purpose of notifying persons entering the plant that a strike was called because of reduction of wages and to persuade such persons not to replace striking workmen. Defendant denied threats or violence or responsibility for any such activities. An injunction issued enjoining defendants in any manner by use of persuasion, threats, personal injury, intimidation, from hindering, stopping, obstructing any person in the employ of the complainant and from picketing or maintaining at or near the premises of complainant or on the streets leading to these premises any picket or pickets. The Tri-City Council was a labor organization consisting of representatives of 37 trade unions in three cities. In 1914, plaintiff, which ordinarily employed 1600 men and whose plant had been closed for some 6 months, opened operations with 350 regular men, 150 being skilled workmen. The men employed on the reopening of the plant were offered a lower wage. The Tri-City Council sought to intervene and to negotiate for a restoration of the wage, but were informed that plaintiff was running an open shop and did not propose to recognize or deal with labor unions. On April 22, the council declared a strike, displayed a sign outside the entrance announcing the strike, and called on union men to stay away from the works. Only 2 men acted on the order to strike, 1 a member of the machinists' union and 1 who was not a union member. After discussing the evidence, the court states that it is clear that violent methods were so pursued as to characterize the attitude of the picketers as continuously threatening, and that it had the effect of putting employees and would-be employees in such

fear that many abandoned work. The question was whether section 20 of the Clayton Act was applicable. It was held, following the Duplex Case, that section 20 applied only to cases growing out of a dispute between the employer and employee concerning terms or conditions of employment. Only 2 of the defendants (the 2 who responded to the strike order) were employees qualified to invoke section 20. As to them, the court considered how far under section 20 their conduct might go without constituting a violation of the rights of those whom they would influence. It was the view of the court that picketing must not be done under circumstances which constitute intimidation or by numbers that produce such a result, and that the acts of defendant employees were not within the protection of section 20. The decree was modified as to them, howeevr, by striking the restraint against "persuasion."

The next question was thus stated: Is interference of a labor organization by persuasion and appeal to induce a strike against low wages without lawful excuse and malicious when its members are in the employ or have been in the employ of the employer involved? The court held that this must receive a negative answer under the Clayton Act. It was recognized that to make labor organization effective employees must make their combination extend beyond one shop, for the reason that the conditions in one shop are bound to affect the standards and wages in other shops at least in the neighborhood. It was considered that unions may use all lawful propaganda to enlarge their membership, especially among whose labor at lower wages will injure the entire guild. The Hitchman Case (Hitchman Coal & Coke Co. v. Mitchell), 245 U. S. 229, 38 S. Ct. 65, 62 L. Ed. 260, L. R. A. 1918 C, 497, Ann. Cas. 1918 B, 461, is distinguished on the grounds that there the purpose to induce a breach of contract was not lawful and that here it is. The Duplex Case, supra, is distinguished because that dealt with a secondary boycott on the part of persons having nothing to do with the machinists' union. Since the acts with which defendants are charged involved no

secondary boycott, and since there was in fact a dispute between an employer and a labor union, many of whose members were employees and many more of whose members had been employees and might reasonably be expected to be re-employed, the court held that the injunction should be modified by deleting the restraint against persuasion.

The Tri-City Case followed the Duplex Case in holding that section 20 had application only to the two members of the union who at that time happened to be employed by the plaintiff. However, the opinion recognizes that employees must make their combination extend beyond one shop in order to avoid the general lowering of the standards in other shops and that they may engage in lawful propaganda to this end and also, with certain limitations, in peacefully persuading employees to leave an employer. While the Duplex Case holds that a labor union, none of whose members are working for a particular employer, has no right to adopt coercive measures for the purpose of unionization, the Tri-City Case holds that if a union has members working for the particular employer, it may employ, under the protection of the Clayton Act, peaceful persuasion, at least for the purpose of improving wages and working conditions. There appears to be no doubt that the limited effect given to the Clayton Act by these decisions aroused the dissatisfaction of labor and brought the attention of Congress to the subject, resulting in the enactment of the Norris-LaGuardia Act. The House Committee Report on the Norris-LaGuardia Act refers to the Duplex and Tri-City Cases and recites the fact that the act was construed to restrict the use of injunctions in favor only of the immediate disputants "and that other members of the union not standing in the proximate relation of employer and employee could be enjoined." With respect to section 13 of the Norris-LaGuardia Act (29 U. S. C. A. § 113), containing a definition of a labor dispute, the report states that this section contains "a definition of a person participating in a labor dispute which is broad

enough to include others than the immediate disputants and thereby corrects the law as announced in the case of Duplex Printing Press Co. v. Deering," supra, which is said to have held that section 20 of the Clayton Act "only related to those occupying the position of employer or employee and no others." The report quotes Mr. Chief Justice Taft's statement in the Tri-City Case as to the necessity for labor organizations to enter labor disputes for the purpose of protecting general standards of working conditions. It concludes that since labor has the right to combine for the purpose of securing increased wages or better conditions of labor, and since the strike is a lawful instrument in the struggle between employer and employee, it would be hypocrisy to concede these rights and then to prohibit any effective exercise of them by labor. The primary purpose of the legislation is said to be to protect, first, the right of free association, and, second, the right to advance the lawful object of association.

[1] It is contended by plaintiff that both the language of the Norris-LaGuardia Act and the committee reports respecting it indicate a purpose merely to avoid the unduly restrictive interpretation given to the Clayton Act by the Duplex Case and other cases and to confer upon workmen the right of effective association referred to by Chief Justice Taft in the Tri-City Case; that decisions following the Norris-LaGuardia Act have so construed the act, notably United Electric Coal Companies v. Rice (C. C. A.) 80 F. (2d) 1, and Lauf v. E. G. Shinner & Co. (C. C. A.) 82 F. (2d) 68. The latter case construed and applied the provisions of the Wisconsin Labor Code which it held to be not materially different from those of the Norris-LaGuardia Act.

Specifically, it is the contention of plaintiff that the Norris-LaGuardia Act and the Wisconsin Labor Code enlarge the immunities conferred by the Clayton Act and its Wisconsin equivalent so as to enable employees engaged in a dispute with their employer to receive the aid of others in the same craft or industry, but that both these

acts, like the Clayton Act, depend for their application in every instance upon the existence of a basic employee-employer dispute. It is claimed that the text of the act supports this view. This claim necessitates an examination of the language of subsections (1) and (3) of section 103.62.

With respect to subsection (3), it is contended that the words "regardless of whether or not the disputants stand in the proximate relation of employer and employe" were inserted merely to repudiate the doctrine of the Duplex Case which made the Clayton Act available only to the actual employees and to repudiate the rule that other members of a union not standing in the proximate relation of employer and employee could be enjoined from interference in the dispute. This view was taken by the Circuit Court of Appeals for the 7th Circuit in the United Electric Coal Companies and Lauf Cases, supra. In the first of these, United Electric Coal Companies v. Rice, supra, plaintiff operated a mine. It had a contract with the United Mine Workers of America, and this contract called for the employment of members of this union. A rival union sought to oust the United and demanded recognition as the union with which plaintiff must deal. There was no dispute in the plant as to wages or working conditions. This court held that the Norris-LaGuardia Act did not apply to give the Progressive union any standing as a disputant. It held that there must be a dispute between the employer and employee growing directly out of their relationship; that the act does not apply to disputes between employees or to disputes between employee unions to which the employer is not a real party. It held that there was no controversy between the plaintiff and the Progressive union on any subject. The plaintiff's men could join any union they wished.

In Lauf v. E. G. Shinner & Co. (C. C. A.) 82 F. (2d) 68, the question involved was the right of a union to picket the plaintiff's market in Milwaukee. In that case there was no dispute between the employer and employees, and

the labor union did not represent any of the employees of the plaintiff. It was held that no labor dispute existed within the meaning of the Wisconsin act or Norris-LaGuardia Act; that the Wisconsin act is not materially different from the Norris-LaGuardia Act; and that on the authority of the United Electric Coal Companies Case there must be a labor dispute between the employer and employee before outsiders may participate. Some weight is also given to the fact that under the Wisconsin and federal acts any coercion of its employees by plaintiff would be a violation of the act.

In spite of the authority of these cases, it is our view that the language of the labor code is plain and unambiguous and does not exact as a prerequisite to a labor dispute that there be a controversy between an employer and his employees. Subsection (3) makes the scope of a controversy broad enough to include questions relating to association or representation of persons relative to conditions of employment or industrial relations, and this regardless of whether or not the disputants stand in the proximate relation of employer and employee. While an able argument is made to the effect that this last clause was merely intended to permit a labor union to come to the aid of members or at the most workmen who are engaged in a labor dispute, this construction cannot be sustained. It is the disputants who need not stand in the relation of employer and employee. Plaintiff's contention implies that basically the disputants must be the employer and the employee, whereas the act plainly indicates that the disputants, that is to say, the principals to a labor dispute, need not stand in the relation of employer and employee. This is further fortified by subsection (1) which provides as follows:

> "(1) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in a single industry, trade, craft, or occupation; or who are employes of one employer; or who are members of the same or an affiliated organization

of employers or employes; whether such dispute is (1) between one or more employers or associations of employers and one or more employes or associations of employes; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employes or associations of employes and one or more employes or associations of employes; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in subsection (3)), of 'persons participating or interested' therein (as defined in subsection (2))."

This language is extremely broad and we find it impossible to escape the conclusion that labor unions have standing as disputants, provided the subject-matter of the dispute comes within the definitions as set forth in subsection (3), and this in spite of the fact (1) that there is no dispute between the employer involved and his employees; (2) that no members of the union are employed by the employer in question; and (3) that the only dispute relates to the unionization of the plant. Apart from the language of the act, we cannot believe, in the light of the history of this legislation, that either the Norris-LaGuardia Act or Wisconsin Labor Code was ever designed to have the limited effect contended for by plaintiff. Only a strained construction of the House Committee Reports and the text of the statutes can give color to such an argument.

One of the committee consultants when the Norris-LaGuardia Act was under consideration in Congress was Prof. Frankfurter of the Harvard Law School. In his text on the subject of "The Labor Injunction" it is said, after reciting the problem with which the Norris-LaGuardia Act deals: "How far a union in one craft may use its power to achieve the unionization of non-union plants within the same craft. • • •" He states that section 9 of the proposed bill (29 U. S. C. A. § 109) settles all of these questions so far as application for equitable relief is concerned. "Immunity from injunctions extends to all the categories

we have described save alone as to persons who are not engaged in the same industry with the complainant. * * * The interpretation given to the Clayton Act by the Duplex Case to the effect that the privileges of that act may be invoked only in a dispute between an employer and his employees, is thus rendered innocuous. * * *"

It is plain to us that the proponents of the Norris-LaGuardia Act intended to enact into law the views thus expressed in Exchange Bakery & Restaurant v. Rifkin, 245 N. Y. 260, 157 N. E. 130, 132:

> "The purpose of a labor union to improve the conditions under which its members do their work; to increase their wages; to assist them in other ways, may justify what would otherwise be a wrong. So would an effort to increase its numbers and to unionize an entire trade or business. It may be as interested in the wages of those not members, or in the conditions under which they work as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages. All, by the principle of collective bargaining. Economic organization to-day is not based on the single shop. Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory, but generally. That they may prevail, it may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor. And it may adopt either method separately. Picketing without a strike is no more unlawful than a strike without picketing. Both are based upon a lawful purpose. Resulting injury is incidental and must be endured."

This seems to have been the view of the court in Levering & Garrigues Co. v. Morrin (C. C. A.) 71 F. (2d) 284. See, also, Miller Parlor Furniture Co. v. Furniture W. I. Union (D. C. N. J.) 8 F. Supp. 209; Cinderella Theater Co. v. Sign Writers' Local Union (D. C.) 6 F. Supp. 164; 36 Col. Law Review, 157.

We consider that the language of this act clearly accom-

plishes that result. The addition to the Wisconsin Labor Code heretofore indicated by italics which extends the scope of labor disputes to controversies concerning employment relations or any other controversy arising out of the respective interests of employer and employee makes it even clearer that such was the intention of the Legislature in enacting this subsection.

[2] That the act as so construed is unconstitutional is the next assertion made by the plaintiff. The first contention is that the act is invalid under the Fourteenth Amendment because it authorizes an unwarranted and unreasonable interference with the right of plaintiff to carry on its business and that of its employees to bargain collectively, that it denies plaintiff equal protection of the laws, and that it is not a legitimate exercise of the police power. Plaintiff's principal reliance is upon the case of Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 128, 66 L. Ed. 254, 27 A. L. R. 375.

In the Truax Case plaintiffs owned a restaurant in the city of Bisby, Ariz. The defendants were cooks and waiters formerly in plaintiff's employ and the labor union and trades' assembly of which they were members. In April, 1916, a dispute arose between plaintiffs and the union concerning terms and conditions of employment of members of the union employed by plaintiff. Plaintiff refused the demands of the union, and it ordered a strike of its members who were in plaintiffs' employ. Thereafter, defendants entered into a conspiracy and boycott to enforce the demands of the union. The method included picketing, displaying banners advertising the strike, denouncing plaintiffs as unfair to the union, circulation of hand bills containing abusive and libelous charges against plaintiffs and intimations of injury to future patrons. The state of Arizona had a statute with provisions substantially similar to those of the Clayton Act. It was argued that if these provisions made defendants' acts lawful, plaintiffs' rights under the Fourteenth Amendment were violated and the law void. The state courts dismissed the

complaint. The state Supreme Court (20 Ariz. 7, 176 P. 570) took the position that the gist of plaintiffs' charge was that defendants were merely inducing patrons to cease patronage by making public the fact of the dispute and the attitude of plaintiffs in it; that no man has a fixed property right in the esteem of the public; that while plaintiff had a right to refuse the demands of the union, the union had a right to advertise the cause of the strike; that picketing, if peacefully carried out for a lawful purpose, was not a violation of plaintiffs' rights under the Arizona statute; and that while picketing was unlawful in Arizona prior to this act, plaintiffs had no vested right to have such a rule continue in that state. The Supreme Court of the United States held that under the statute as thus construed, picketing may be exercised in any form without invading plaintiffs' rights, providing violence is not employed. The court describes the method of picketing by defendants as follows: (1) Having agents of the union walk back and forth constantly during business hours displaying a banner announcing that the restaurant was unfair to cooks, waiters, and their union; (2) having these agents attend at or near the entrance to the restaurant and announce the same matters in a loud tone of voice; (3) characterizing employees of plaintiff as scab Mexican labor and applying opprobrious epithets to them in hand bills circulated to would-be customers in front of the restaurant; (4) including in such hand bills abusive and libelous attacks upon the senior member of plaintiffs' firm; (5) seeking to disparage food, service, and prices and general conduct of plaintiffs' restaurant; (6) attacking the character of those who would patronize the restaurant; and (7) threatening those who disregarded the urging of the pickets and actually patronized plaintiffs' restaurant. The court states the real question to be whether the means used were legal and concludes that they were not and that the defendants' acts constituted palpable wrongs. The court states:

"It was not lawful persuasion or inducing. It was

> not a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage. • • • It was moral coercion by illegal annoyance and obstruction, and it thus was plainly a conspiracy."

It was held that an act which operates to make lawful such a wrong deprives the owner of the business of property without due process and is void under the Fourteenth Amendment. In reply to the contention that this was a proper exercise of the police power and that property rights must yield to such power reasonably exercised, the court says:

> "The broad distinction between one's right to protection against a direct injury to one's fundamental property right by another who has no special relation to him, and one's liability to another with whom he establishes a voluntary relation under a statute is manifest upon its statement."

It is pointed out that this is not a mere case of a peaceful secondary boycott as to the illegality of which courts have differed. Here the illegality of the means was without doubt and fundamental. The means used were libelous and abusive attacks on the plaintiffs' reputation, like attacks on their employees and customers, threats of such attacks on would-be customers, picketing and patrolling of the entrance to their place of business, and the consequent obstruction of free access thereto—all with the purposes of depriving the plaintiffs of their business. To permit these definitely illegal acts and to decline to give a remedy effective against them would be to deny and disregard fundamental rights of liberty and property. Under the Constitution of Arizona, the plaintiffs would have had the right to an injunction. If defendants' acts had been done as the result of any other controversy than a labor dispute, an injunction would necessarily have issued. To deny it in this case would be to deny equal protection of the laws.

It seems to us that this case is not applicable to the present situation. As we read the case, it is held that with respect to acts constituting libel, slander, intimidation, threats, breaches of the peace, or threatened breaches of the peace, which are recognized as definitely illegal, statutory immunity from legal redress cannot validly be conferred upon labor unions, and the Legislature must retain and give effect to all legal and equitable remedies created by the Constitution for the enforcement of rights and the redress of wrongs. See 13 N. Y. U. L. Q. Rev. 92, at page 96. It is not apparent to us, however, that the Legislature may not recognize the peculiar status of labor organizations in labor disputes because of the self-interest of the union and its members and the assumed necessity for protective group action and confer an immunity with respect to acts involving none of these wrongful features whether they take the form of picketing or not. There is no substantial question of classification. To hold that there was would put into question the validity of both the Clayton Act, the Norris-LaGuardia Act, and the Wisconsin Labor Code, no matter how these acts were construed.

[3, 4] The question is whether the Legislature may declare lawful acts on the part of workingmen or groups of them that in its judgment are necessary in order to give to labor an economic weapon which tends to balance the capacity for economic duress which past conditions have created in the employer. We discover no constitutional provision which denies this power to the Legislature. The evils which may and do flow from the natural bargaining advantage held by the employer may be recognized as calling for legislative correction and conceivably may be met in a variety of ways. It has here been met by equalizing the bargaining power of labor and leaving the determination of wages and working conditions to the play of economic forces. We cannot say that the Legislature may not validly permit acts on the part of labor organizations not intrinsically wrongful as involving violence, intimidation, or misrepresentation, the purpose of which is to give

notoriety to the attitude of the employer in a labor dispute. That the philosophy underlying such immunities is that the worker should have some economic advantage to balance that theretofore held by the employer and arising out of the control of jobs, is not a sufficient reason for denial of the legislative power, or for the conclusion that the exercise of this power results in the impairment of the constitutional rights of the employer. If it is, then the act cannot be sustained on any construction. The presence of a few union members in plaintiff's employ or the existence of a dispute between plaintiff and its employees would not be a circumstance sufficient to validate immunities extended to those not in plaintiff's employment, if these immunities were intrinsically beyond the power of the Legislature to confer. Assuming a dispute between employer and employee, the only justification for extending the provisions of the code to outside organizations is their general self-interest in procuring satisfactory working and bargaining conditions in the craft or industry represented, and this interest exists whether the employees are in dispute with their employers or not. We conclude that the act as we construe it does not deny to plaintiff due process or equal protection of the laws and is a valid exercise of legislative power so far as this objection is concerned. Whether such laws constitute a wise solution may, of course, be fairly put in question, but the forum for such a controversy is the Legislature and not the courts. The question is irrelevant here, and we cannot resist the conclusion that one of the purposes of the labor code was to make it so and to substitute a legislative declaration of policy for the varying standards and views theretofore expressed in judicial opinions.

[5, 6] The next contention is that the Wisconsin Labor Code, if construed to deny injunctive relief in such a situation as was here presented, is violative of sections 1, 9, and 22, art. 1, and sections 2 and 8, art. 7, of the Constitution of Wisconsin. Article 7, § 2, vests the judicial power in this state both in matters in law and equity in the

Supreme Court, circuit courts, etc. Section 8 of article 7 confers original jurisdiction upon certain courts and confers upon them the power to issue writs of injunction necessary to carry into effect their orders, judgments, and decrees. Article 1, § 9, provides that every person is entitled to a certain remedy in the laws for all injury or wrongs which he may have received in his person, property, or character. The act is claimed invalidly to limit the equitable powers of the circuit court. It is not necessary to discuss here the undoubted limitations upon the power of the Legislature to diminish the jurisdiction of the circuit court. It is beyond question that the Legislature may change the substantive law and in doing so increase or reduce the subject-matter upon which the jurisdiction of courts operates. It may enact a statute creating a crime or repeal such a statute. The first enactment does not increase nor does the latter diminish the jurisdiction of a court. It merely is an exercise of the power of the Legislature to declare the public policy of the state and punish offenses against its sovereignty. Unless there is some other constitutional objection, such laws would not be invalid as interferences with the jurisdiction of the courts. When the Legislature makes peaceful picketing valid under certain prescribed circumstances, it leaves nothing for an injunction to operate upon. The provisions of such a law are substantive in character. They may or may not be unconstitutional on some other ground, but it is certain they are not unconstitutional upon the ground assigned.

[7] We conclude that defendant unions had standing under the act, although representing none of the members of their craft employed by plaintiff, and although there was no dispute between plaintiff and its employees, to be a disputant with plaintiff, and that unionization of plaintiff's store could constitute a proper subject for dispute. We further conclude that the act, so construed, is not repugnant to any constitutional provision.

[8] We have deferred until this time discussion of a

question that both briefs assume to be necessarily answered by the determination heretofore made, but which we are satisfied is separate and distinct. Plaintiff contends that for it to require its employees to name defendants as their bargaining agents would violate the right of the employees to be free from its coercion in such matters, and that any picketing of plaintiff, however peaceful, constitutes pressure upon it to compel the doing of an illegal act or at least one that is contrary to public policy. It seems that is contrary to public policy. It seems to us that, even if this contention be sound, it does not militate against the propositions heretofore decided. Thus, it coming to the attention of a union that a particular employer (1) is paying extremely low wages to workers in the craft it represents, or (2) is insisting upon unduly long hours of labor, or (3) is refusing to hire union labor or to permit members of a union to work for him, it could make demands for changes and, upon refusal of these demands, be considered a party to a labor dispute and entitled to the exemptions of the act. On the other hand, regardless of its standing to become a disputant, the terms of the act cannot be stretched to permit a union to enforce by picketing demands which the employer may not lawfully accede to. It is plaintiff's position that this is in effect what defendants are permitted to do by the terms of the judgment; that the very act under which defendant claims its rights to picket prohibits coercion of the employees by the employer or any interference by him with the right of the employees freely to organize and select their agencies for collective bargaining. Defendants contend that the act evidences a purpose to foster organizations of employees and recognizes the helplessness of the individual employee; that to grant plaintiff's view is to outlaw all closed shop agreements and thus to restrict rather than to extend the rights of workmen and organized labor, contrary to the plainly evidenced intent of the act.

The question has given us much concern, and its solution is attended with very substantial difficulties. Plain-

tiff stands indifferent, willing to permit the union to persuade his men to join a union, willing to bargain with the union if it succeeds in winning the allegiance of the men, and, with its employees' consent, to sign contracts vesting in the union the right to represent the men. It declines, however, to coerce its employees in any respect. May it be subjected to picketing to compel it to insist, as a condition of continued employment, that its men consent to the designation of defendant unions as their bargaining agents?

If the above analysis is correct, the question is whether in this case defendants are seeking by such pressure as is involved in peaceful picketing to compel plaintiff to violate the rights of free association and collective bargaining which this court has held to be vested in the employees under section 103.51. Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Mfg. Co., 215 Wis. 623, 256 N. W. 56.

[9] Section 103.51, Stats., which is entitled "Public Policy as to Collective Bargaining," reads as follows:

> "In the interpretation and application of sections 103.51 to 103.63 the public policy of this state is declared as follows:
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> "Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employes. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workmen have full freedom of association, self-organization, and the designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representa-

tives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Plaintiff naturally lays much stress upon the requirement that a negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees, and that portion of the section which confers upon the individual workman full freedom of association and designation of representatives of his own choosing free from interference, restraint, or coercion by his employer. Defendants' contention is that this section was for the purpose (1) of encouraging associations of workmen to conduct collective bargaining; (2) to insure that such associations would be free from the dominance or control by employers to the end that workmen might be able to bring to bear in their negotiations with employers whatever weight or power results from collective or group effort. We are of the opinion that defendants' contention with respect to the general purpose of the act is sound. The futility of individual negotiation is expressly recognized, and the purpose of the act is to encourage group negotiation as a substitute and to protect the latter activity from dominance or coercion by the employer.

There is nothing in the act to indicate that existing closed shop agreements are intended to be invalidated or future agreements of this character prohibited unless such intention is to be implied from the requirement that employers practice no restraint or coercion upon the exercise by the employees of their right to associate and to name their bargaining agents. See 44 Yale L. J. 1067; 48 Harv. Law Review, 656. On the other hand, it is plain that the act does not require the employees to adopt any specified form of organization or to affiliate with existing outside labor organizations. We are faced with the seeming contradiction that while the act contains no expressed intention to outlaw closed shop agreements, it is expressly provided that activities of employees in the direction of association and organization for bargaining purposes shall

not be subject to coercion or interference by employers. The conclusion that the latter was one of the principal purposes of this act as well as the Norris-LaGuardia Act is indicated not merely by the text of the acts, but by the practical construction given substantially similar provisions of section 7 (a) of the National Industrial Recovery Act (15 U. S. C. A. § 707 (a)) by the National Labor Board. See 4 George Washington Law Review, 433.

The question is not easy of solution. Defendant contends that the purpose of the act is merely to prevent dominance by an employer of the organization of his employees and that, so long as he exacts as a condition of continued employment membership in an outside union over which he has no control, the purposes of the act are promoted rather than defeated. While much may be said for this view, it is extremely difficult to reconcile with the full freedom of association and designation of representatives which the act expressly secures to the men. It may well be that if, when negotiations for a closed shop are initiated between an outside labor union and an employer, the employees have already exercised, free from their employer's domination, or are in the process of so exercising their right to organize and to select representatives for collective bargaining, the employer may not insist that another or different plan of organization be adopted or that other representatives be chosen. If he may not, then no pressure may be brought to bear upon him by an outside union to compel such action. Whether pressure of the sort authorized by the act may be brought upon the employees by the outside union, it is unnecessary to determine, although in this connection it may be significant that neither the Wisconsin Labor Code nor the Norris-LaGuardia Act contain any provisions expressly inhibiting labor organizations from exercising the coercion and domination prohibited to employers. See 47 Harv. L. Rev. 117; 21 Cornell Law Quarterly Rev. 640.

We do not find it necessary finally to determine the difficult questions above set forth. Assuming that defendant's

contentions with respect to them be rejected and the rule most favorable to plaintiffs established, the result in this case would not be affected.

[10] The law plainly protects not the unorganized individuals constituting the employees, but the right of employees to act in groups or associations. It deals with the collective effort of employees to better their conditions, and it is only their activities in this direction that are brought within the protection of the statute. The rights of employees not to organize and not to name bargaining agents is neither fostered nor protected. Where the employees have neither organized and named their bargaining representatives nor taken any steps so to organize, we see nothing in the act which prohibits the employer selecting their bargaining agent by contract with a labor union which is not subject to his domination. Such a step promotes rather than defeats the purpose of the code.

This is the situation presented by the facts in this case. The employees involved in the crafts represented by defendant unions were not organized, had taken no steps to organize, and did not desire so to do. The mere refusal by the employees to join defendants' unions or to assent to a contract making the unions their bargaining representatives did not constitute the exercise of steps leading to organization of the employees for bargaining purposes. What happened was that the men simply declined or neglected to organize or at least had taken no steps in that direction. In such a situation, plaintiff could exercise the right that it always had, in the absence of statute, to establish whatever conditions for continued employment its judgment might dictate with the one exception that it could not insist upon a type of organization which preserved to it a position of dominance.

Thus, we conclude that such peaceful picketing as was authorized by the court in this case cannot be said to have had as its objective pressure upon the employer to do an unlawful act by interfering with the rights of his employees to carry on such measures of organization and col-

lective bargaining as they might freely decide upon. While plaintiff might lawfully decline to enter into such a contract as defendants proposed, we think that when it did so it was in dispute with the union, and the latter might adopt such measures as are sanctioned by the labor code.

[11] There being no motion to review, there is no occasion to comment on the character and extent of picketing permitted under the code further than to say that the activities of defendants permitted by the judgment do not include violence, intimidation, misrepresentation, or obstruction of access by customers and appear to be well within the range of lawful activities as defined by the code.

Judgment affirmed.

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WISCONSIN LABOR CODE.

(Wisconsin Statutes of 1935.)

103.51 **Public policy as to collective bargaining.** In the interpretation and application of sections 103.51 to 103.63 the public policy of this state is declared as follows:

Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employes. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and the designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

103.52 **"Yellow-dog" contracts.** Every undertaking or promise made after the taking effect of this action, whether written or oral, express or implied, between any employe or prospective employe and his employer, prospective employer or any other individual, firm, company, association, or corporation, whereby

(1) Either party thereto undertakes or promises to join or to remain a member of some specific labor organization or organizations or to join or remain a member of some specific employer organization or any employer organization or organizations; or

(2) Either party thereto undertakes or promises not to join or not to remain a member of some specific labor organization or any labor organization or organizations, or of some specific employer organization or any employer organization or organizations; or

(3) Either party thereto undertakes or promises that he will withdraw from an employment relation in the event that he joins or remains a member of some specific labor organization or any labor organization or organizations, or of some specific employer organization or any employer organization or organizations;

Is hereby declared to be contrary to public policy and shall not afford any basis for the granting of legal or equitable relief by any court against a party to such undertaking or promise, or against any other persons who may advise, urge or induce, without fraud, violence, or threat thereof, either party thereto to act in disregard of such undertaking or promise. This section in its entirety is supplemental to and of subsection (1) of section 103.46 of the statutes.

103.53 **Lawful conduct in labor disputes.** (1) The following acts, whether performed singly or in concert, shall be legal:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment regardless of any promise, undertaking, contract or agreement in violation of the public policy declared in section 103.52;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103.52;

(c) Paying or giving to, any person any strike or unemployment benefits or insurance or other moneys or things of value;

(d) By all lawful means aiding any person who is being

proceeded against in, or is prosecuting any action or suit in any court of the United States or of any state;

(e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof;

(f) Ceasing to patronize or to employ any person or persons, but nothing herein shall be construed to legalize a secondary boycott;

(g) Assembling peaceably to do or to organize to do any of the acts heretofore specified or to promote lawful interests;

(h) Advising or notifying any person or persons of an intention to do any of the acts heretofore specified;

(i) Agreeing with other persons to do or not to do any of the acts heretofore specified;

(j) Advising, urging, or inducing without fraud, violence, or threat thereof, others to do the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103.52; and

(k) Doing in concert any or all of the acts heretofore specified shall not constitute an unlawful combination or conspiracy;

(l) Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal.

(2) No court, nor any judge or judges thereof, shall have jurisdiction to issue any restraining order or temporary or permanent injunction which, in specific or general terms, prohibits any person or persons from doing, whether singly or in concert, any of the foregoing acts.

103.54 **Responsibility for unlawful acts.** No officer or member of any association or organization, and no asso-

ciation or organization participating or interested in a labor dispute (as these terms are defined in section 103.62) shall be held responsible or liable in any civil action at law or suit in equity, or in any criminal prosecution, for the unlawful acts of individual officers, members, or agents, except upon proof by a preponderance of the evidence and without the aid of any presumptions of law or fact, both of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization, and (b) actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization.

103.55 **Public policy as to labor litigation.** In the interpretation and application of sections 103.56 to 103.59, the public policy of this state is declared to be:

Equity procedure that permits a complaining party to obtain sweeping injunctive relief that is not preceded by or conditioned upon notice to and hearing of the responding party or parties, or that issues after hearing based upon written affidavits alone and not wholly or in part upon examination, confrontation and cross-examination of witnesses in open court, is peculiarly subject to abuse in labor litigation for the reasons that

(1) The status quo cannot be maintained but is necessarily altered by the injunction;

(2) Determination of issues of veracity and of probability of fact from affidavits of the opposing parties that are contradictory and, under the circumstances, untrustworthy rather than from oral examination in open court is subject to grave error;

(3) Error in issuing the injunctive relief is usually irreparable to the opposing party; and

(4) Delay incident to the normal course of appellate practice frequently makes ultimate correction of error in law or in fact unavailing in the particular case.

103.56 **Injunctions: conditions of issuance; restraining orders.** (1) No court nor any judge or judges thereof shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in section 103.62, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of all the following facts by the court or judge or judges thereof:

(a) That unlawful acts have been threatened or committed and will be executed or continued unless restrained.

(b) That substantial and irreparable injury to complainant's property will follow unless the relief requested is granted;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial thereof than will be inflicted upon defendants by the granting thereof;

(d) That the relief to be granted does not violate the provisions of section 103.53;

(e) That complainant has no adequate remedy at law; and

(f) That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection.

(2) Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to those public officers charged with the duty to protect complainant's property. Provided, however, that if a complainant shall also allege that unless a temporary restraining order shall be issued before such hearing may be had, a substantial and irreparable injury to complainant's property will be unavoidable, such a tem-

porary restraining order may be granted upon the expiration of such reasonable notice of application therefor as the court may direct by order to show cause, but in no case less than forty-eight hours.

(3) Such order to show cause shall be served upon such party or parties as are sought to be restrained and as shall be specified in said order, and then only upon testimony under oath, or in the discretion of the court, upon affidavits, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing as herein provided for.

(4) Such a temporary restraining order shall be effective for no longer than five days, and at the expiration of said five days shall become void and not subject to renewal or extension, provided, however, that if the hearing for a temporary injunction shall have been begun before the expiration of the said five days the restraining order may in the court's discretion be continued until a decision is reached upon the issuance of the temporary injunction.

(5) No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

(6) The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any

party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

103.57 **Clean hands doctrine.** No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any legal obligation which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available machinery of governmental mediation or voluntary arbitration, but nothing herein contained shall be deemed to require the court to await the action of any such tribunal if irreparable injury is threatened.

103.58 **Injunctions: contents.** Except as provided in section 103.56, no restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and expressly included in said findings of fact made and filed by the court as provided herein; and shall be binding only upon the parties to the suit, their agents, servants, employes and attorneys, or those in active concert and participation with them, and who shall by personal service or otherwise have received actual notice of the same.

103.59 **Injunctions: appeals.** Whenever any court or judge or judges thereof shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings, and on his filing the usual bond for costs,

forthwith certify the entire record of the case, including a transcript of the evidence taken, to the appropriate appellate court for its review. Upon the filing of such record in the appropriate appellate court the appeal shall be heard with the greatest possible expedition, giving the proceeding precedence over all other matters except older matters of the same character.

103.60 **Contempt cases.** In all cases where a person shall be charged with civil or criminal contempt for violation of a restraining order or injunction issued by a court or judge or judges thereof, the accused shall enjoy:

(1) The rights as to admission to bail that are accorded to persons accused of crime.

(2) The right to be notified of the accusation and a reasonable time to make a defense, provided the alleged contempt is not committed in the immediate view or presence of the court.

(3) Upon demand, the right to a speedy and public trial by an impartial jury of the county wherein the contempt shall have been committed, provided that this requirement shall not be construed to apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court. All contempt proceedings, whether civil or criminal, brought for the alleged violation of any such restraining order or injunction, are, and hereby are declared to be independent, original, special proceedings, and shall require a unanimous finding of the jury.

(4) The right to file with the court a demand for the retirement of the judge sitting in the proceeding, upon an affidavit of prejudice being filed as is now provided by law in other cases. Upon the filing of any such affidavit, the judge shall thereupon proceed no further, but another judge shall be designated as is now provided for in other

cases. The affidavit shall be filed prior to the hearing in the contempt proceeding.

103.61 **Punishment for contempt.** Punishment for a contempt, specified in section 103.60, may be by fine, not exceeding twenty-five dollars, or by imprisonment not exceeding ten days, in the jail of the county where the court is sitting, or both, in the discretion of the court. Where a person is committed to jail, for the nonpayment of such a fine, he must be discharged at the expiration of fifteen days; but where he is also committed for a definite time, the fifteen days must be computed from the expiration of the definite time.

103.62 **Definitions.** When used in sections 103.51 to 103.63, and for the purposes of these sections:

(1) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in a single industry, trade, craft, or occupation; or who are employes of one employer; or who are members of the same or an affiliated organization of employers or employes; whether such dispute is (1) between one or more employers or associations of employers and one or more employes or associations of employes; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employes or associations of employes and one or more employes or associations of employes; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in subsection (3)) of "persons participating or interested" therein (as defined in subsection (2)).

(2) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the industry, trade, craft, or occupation in which such dispute occurs, or is a member, officer, or agent of any asso-

ciation of employers or employes engaged in such industry, trade, craft, or occupation.

(3) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employe, regardless of whether or not the disputants stand in the proximate relation of employer and employe.

103.63 **Severability of provisions.** If any provision of sections 103.51 to 103.63 or the applications thereof to any person or circumstance is held invalid, the remainder of these sections and the application of such provisions to other persons or circumstances shall not be affected thereby.

72d Congress } HOUSE OF REPRESENTATIVES { Report
1st Session } { No. 669

DEFINE AND LIMIT THE JURISDICTION OF COURTS SITTING IN EQUITY

March 2, 1932.—Referred to the House Calendar and ordered to be printed

Mr. La Guardia, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 5315]

The Committee on the Judiciary, to whom was referred the bill (H. R. 5315) to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes, after hearing (serial 3) and consideration, reports the same favorably with amendments and recommends that the bill as amended do pass.

The committee amendments are as follows:

Page 1, line 7, strike out the word "of" following the word "order" and insert in lieu thereof the word "or".

Page 3, line 3, after the word "enforceable" add the following words "in any court of the United States".

Page 3, line 5, after the word "any" insert the word "such", and in the same line strike out the words "of the United States".

Page 3, line 24, after the word "in" add the words "any case" and strike out the word "cases".

Page 5, line 15, strike out the words "and no association or organization".

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Page 5, line 21, strike out the period after the word "thereof" and insert the following words: "and the liability of any such association or organization for unlawful acts of its members shall be similarly limited" followed by a period.

Page 6, line 5, after the word "been" insert the following words: "threatened or".

Page 6, line 6, after the word "restrained" strike out the semicolon and insert the following words: "but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act except against the person or persons, association or organization making the threat or committing the unlawful act or who actually authorized it or ratified it after actual knowledge thereof" to be followed by a semicolon.

Page 7, line 9, after the word "security" insert the words "in an amount to be fixed by the court".

Page 7, line 21, after the first word "surety" add the following words: "upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice".

Page 9, line 6, after the word "cases" insert the words "arising under this act in which" and strike out the word "where".

Page 9, line 7, strike out the words "indirect" and "for violation of a restrain-".

Page 9, line 8, strike out the words "ing order or injunction issued by" and insert in lieu thereof the word "of".

Page 9, line 12, strike out the word "requirement" and insert in lieu thereof the word "right", and in lines 12 and 13 strike out the words "be construed to".

Page 9, line 19, strike out the words "is authorized to" and insert in lieu thereof the word "may".

Page 9, line 25, strike out the word "provided" and insert in lieu thereof the words "is provided by law" followed by a period.

Page 10, strike out all of line 1 and line 2 down to and including the word "Code".

Page 11, line 11, strike out the word "and" and insert in lieu thereof the word "or" and strike out the words "or concerning".

Page 11, strike out all of line 12 and all of line 13 down to and including the word "employee".

Page 11, line 20, strike out the word "provisions" and insert in lieu thereof the word "part", and strike out, in lines 20 and 21, the words "or the application thereof to any person or circumstances".

Page 11, line 21, after the word "held" insert the words "unconstitutional or otherwise".

Page 11, line 22, strike out the word "remainder" and insert in lieu thereof the words "remaining part", and in lines 22 and 23 strike out the words "and the application of such provisions to other persons or circumstances".

This bill is the so-called anti-injunction bill. It is the outgrowth of years of agitation in the Congress for restriction upon the powers of Federal equity courts in the issuance of injunctions in labor disputes. Hearings have been held by congressional committees over a period of years and the facts adduced have brought about an almost unanimity of opinion that such powers of the Federal courts have been exercised to the detriment of the public welfare and should be curbed.

The questions are sociologic and economic as well as legal and jurisdictional.

The limitation of the jurisdiction of Federal courts to issue injunctions in labor disputes has been a subject of public discussion for many years. It is fair to say that

public sentiment on the subject has reached the conclusion that some such limitation is absolutely necessary. Both of the great political parties in their last national platforms have promised remedial legislation upon the subject. The last Republican National Convention at Kansas City adopted a plank on the subject, as follows:

> The party favors freedom in wage contracts, the right of collective bargaining by free and responsible agents of their own choosing, which develops and maintains that purposeful cooperation which gains its chief incentive through voluntary agreement.
>
> We believe that injunctions in labor disputes have in some instances been abused and have given rise to a serious question for legislation.

Following this, the last Democratic National Convention at Houston, Tex., in its platform, made the following promises:

> (*a*) We favor the principle of collective bargaining and the Democratic principle that organized labor should choose its own representatives without coercion or interference.
>
> (*b*) Labor is not a commodity. Human rights must be safeguarded. Labor should be exempt from the operation of antitrust laws.
>
> (*c*) We recognize that legislative and other investigations have shown the existence of grave abuse in the issuance of injunctions in labor disputes. No injunctions should be granted in labor disputes except upon proof of threatened irreparable injury and after notice and hearing, and the injunction should be confined to those acts which do directly threaten irreparable injury. The expressed purpose of representatives of capital, labor, and the bar to devise a plan for the elimination of the present evils with respect to injunctions must be supported and legislation designed to accomplish these ends formulated and passed.

The purpose of the bill is to protect the rights of labor

in the same manner the Congress intended when it enacted the Clayton Act, October 15, 1914 (38 Stat. L., 738), which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent.

Section 1: Section 1 provides that no United States court shall have jurisdiction to issue an injunction in a case growing out of a labor dispute except in strict conformity with the provisions of the act, and further that no such injunction shall be issued contrary to the public policy declared in the act.

The Constitution of the United States in Article III, section 1, provides:

> The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

The provisions of the bill are expressly limited (sec. 13 (d)) to courts whose jurisdiction has been or may be conferred by the Congress, under the foregoing provision of the Constitution. The Congress having the power to establish, and confer jurisdiction upon, the courts in question, it can not be questioned that it has the power to restrict or curtail the exercise of their powers, as proposed in this bill. The Supreme Court of the United States has clearly recognized that this is the law in Kline *v.* Burke Construction Co. (260 U. S. 226, 234), (1922), wherein the court says that—

> Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the General Government derives its jurisdiction wholly from the authority of Congress. *That body may give, withhold, or restrict such jurisdiction at its discretion* provided it be not extended beyond the boundaries fixed by the Constitution. (Italics supplied.)

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This case involved the jurisdiction of the United States District Court in cases depending upon diverse citizenship; and the Court continued (p. 234) as follows:

> The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. (Nashville *v.* Cooper, 6 Wall. 247, 252, 18 L. ed. 851, 852.) And the jurisdiction, having been conferred, may, at the will of Congress, be taken away in whole or in part; and, if withdrawn without a saving clause, all pending cases, though cognizable when commenced, must fall.

Concerning the so-called inherent power of the courts to punish for contempt, the following is the state of the law:

The judiciary act of September 24, 1789, creating United States district courts, conferred upon them the power to punish for contempt in the following language:

> The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment at the discretion of the court, contempts of their authority.

As early as 1831 the Congress limited this power by the act of March 2, 1831, as follows:

> The power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any case except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness or any other person or persons to any lawful writ, process, order, rule, decree, or command of the said courts (4 Stat. L. 487)—

which is now section 385, title 28, chapter 10, United States Code:

> SEC. 385. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

Speaking of the act of March 2, 1831, the Supreme Court, in Ex parte Robinson (19 Wall., 505, 513), said:

> But the power has been limited and defined by the act of Congress of March 2, 1831. * * * It limits the power of these courts in this respect to three classes of cases: 1, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2, where there has been misbehavior of any officer of the courts in his official transactions; and, 3, where there has been disobedience or resistance by any officer, party, juror, witness or other person, to any lawful writ, process, order, rule, decree, or command of the court. As thus seen, the power of these courts in the punishment of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes.

Section 21, of the Clayton Act, supra (sec. 386, title 28, U. S. C.) is as follows:

> SEC. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or

> command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

Sections 22, 23, and 24 of the Clayton Act (now secs. 387, 388, and 389, title 28, U. S. C.) provide for procedure in cases of contempt and grant to the accused a trial by jury; with the exception of contempts committed in the presence of the court, etc., as stated in section 385, title 28, United States Code, supra.

The Supreme Court reversing the Circuit Court of Appeals for the Sixth Circuit sustained the constitutionality of the provisions of the Clayton Act, now embodied in the United States Code, supra, in the case of Michaelson *v.* U. S. ex rel. C., St. P., M. & O. R. Co. (266 U. S. 42, 69 L. Ed. 162).

This case involved proceedings, under the Clayton Act of October 15, 1914, for contempt of certain striking railroad employees in violating an injunction against picketing, etc., entered in an equity proceeding. Upon answer and return, the defendants applied for a jury trial under section 22 of the Clayton Act; this request was refused and the court proceeded without a jury; defendants were adjudged guilty of contempt and sentenced. The Circuit Court of Appeals affirmed this judgment, and upon writ of certiorari the Supreme Court considered the constitutionality of sections 21 and 22 of the Clayton Act, and held they were constitutional and that the provision for a jury trial in certain specified kinds of contempt was mandatory and not permissive.

In discussing the statute, and the so-called inherent power of courts to punish for contempt, the court said:

> It is contended that the statute materially interferes with the inherent power of the courts, and is therefore invalid. That the power to punish for contempts is inherent in all courts has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior Federal courts are concerned however, it is not beyond the authority of Congress; but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted. The statute now under review is of the latter character. It is of narrow scope, dealing with the single class where the act or thing constituting the contempt is also a crime in the ordinary sense. It does not interfere with the power to deal summarily with contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, and is, in express terms, carefully limited to the cases of contempt specifically defined. But the simple question presented is whether Congress may require a trial by jury upon the demand of the accused in an independent proceeding at law for a criminal contempt which is also a crime. In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt, and the defendant may not be compelled to be a witness against himself. (Gompers *v.* Buck's Stove & Range Co., supra, 221 U. S. 418, 55 L. Ed. 797, p. 444.) The fundamental characteristics of both are the same. Contempts of the kind within the terms of the Statute partake of the nature of crimes in all essential particulars. The only substantial difference between such a proceeding as we have here, and a criminal prosecution by indictment or information, is that in the latter the act complained of is the vio-

lation of a law, and, in the former, the violation of a decree. In the case of the latter, the accused has a constitutional right of trial by jury, while in the former he has not. The statutory extension of this constitutional right to a class of contempts which are properly described as "criminal offenses" does not, in our opinion, invade the powers of the courts as intended by the Constitution, or violate that instrument in any other way.

Section 2: Section 2 sets forth the public policy of the United States for the guidance of the courts in their interpretation of this proposed law.

Congress has heretofore declared the public policy of the United States for the guidance of the courts. Previous acts of Congress containing wide declarations of policy may be found in the following statutes: Packers and stockyards act, 1921, Stafford *v.* Wallace (258 U. S. 495); transportation act of 1920, Dayton Goose Creek Ry. Co. *v.* United States (263 U. S. 456); Railway labor act of 1926, T. & N. O. Ry. *v.* Brotherhood of Railway Clerks (281 U. S. 548); grain futures act (title 7, U. S. C., sec. 5 et seq.).

In the Clayton Act (title 29, U. S. C., sec. 52), Congress read into the law the declaration of policy that "The labor of a human being is not a commodity or article of commerce."

This statement of public policy as contained in the bill is in accordance with the general trend of enlightened public opinion and finds adequate support in the opinions of the Supreme Court of the United States. For example, in the case of American Steel Foundries *v.* Tri-City Central Trades Council (257 U. S. 184), the Supreme Court, in an opinion by the late Mr. Chief Justice Taft, uses language of marked similarity with the foregoing statement of public policy, as follows:

Labor unions are recognized by the Clayton Act as

> legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers an opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with him. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has, in many years, not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because, in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood.

The inclusion of a statement of public policy in the act itself is unobjectionable. It tends to remove doubt as to the purpose and intention of the Congress and is thereby of assistance to the courts in determining questions of interpretation. Moreover, it is the place to look for a statement of the public policy involved, because, as said by the Supreme Court, the public policy of a State must be ascertained from its laws. (Vidal *v.* Girard, 2 Howard 127; License Tax Cases, 5 Wall. 462; St. Louis Mining & M. Co. *v.* Montana Mining Co., 171 U. S. 650.)

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Furthermore, the Congress has heretofore stated in legislation the public policy in similar manner. For example, as late as 1925 the Congress declared by statute what should be the true policy in rate making to be pursued by the Interstate Commerce Commission, to the effect that conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible so to do, to the end that commodities may freely move (43 Stat. L., 80).

Section 3: Section 3 is designed to outlaw the so-called yellow-dog contract. This section provides that any promise which is described therein or which conflicts with the public policy declared in section 2, is contrary to public policy and shall be unenforceable in any court of the United States. This section includes specifically a promise contained in any agreement of hiring whereby either party promises not to join a labor organization or employer organization, or promises to withdraw from an employment relation in the event he joins any such organization.

This section in no wise is concerned with interstate commerce or the application of the Sherman Act and its amendments, but the Federal courts obtain jurisdiction in cases involving such contracts by virtue of diversity of citizenship; and injunctions have been issued in the Federal courts on the basis of such contracts of employment.

It is easy to say that an employee is not compelled to accept employment and that an employer has the right to make such conditions as he may see fit surrounding the employment. But, aside from the necessity of providing support for himself and family always immediately confronting the workingman, and always materially diminishing his freedom of contract, the vice of such contracts, which are becoming alarmingly widespread, is that if they are carried to their ultimate conclusion, they would abolish

trade-unionism. Indeed that is undoubtedly their purpose, and the purpose of the organizations of employers opposing this bill. With this prospect in immediate view, upon the general adoption of the "yellow-dog" contract, the employee, as stated by the late Mr. Chief Justice Taft in the American Steel Foundries *v.* Tri-City C. C. case, supra, becomes "helpless in dealing with an employer"; and the "union," stated by the same authority as "essential to give laborers an opportunity to deal on equality with their employer," becomes a thing of the past.

Also, as stated in a more recent decision of the Supreme Court of the United States in the case of Texas & N. O. Railroad Co. *v.* Brotherhood of Railway and Steamship Clerks et al. (281 U. S. 548), the opinion being written by Mr. Chief Justice Hughes, "collective action would be a mockery," because collective action would be impossible so far as the employee is concerned by virtue of the necessity of signing the character of contract condemned, which prevents a man from joining with his fellows for collective action; and the statement contained in the same decision that "it has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work" would become an empty statement of historical fact.

Section 4: Section 4 provides that no United States court shall have jurisdiction to issue any injunction in any case involving a labor dispute to prohibit any person participating in such dispute from doing, whether singly or in concert, certain acts. These acts, briefly stated, which can not be enjoined, are the acts of ceasing to work, of becoming a member of a labor or employer organization, of paying any strike benefit, of aiding by lawful means persons participating in a labor dispute who are being proceeded against in a suit, of giving publicity to the facts

involved in a labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence, of assembling peaceably to act in promotion of the interests involved in a labor dispute, of advising any person of any intention to do any of these acts, of agreeing with other persons to do or not to do any of these acts, and of advising or urging without fraud or violence any of these acts regardless of any promise described in section 3 as hereinabove discussed.

These are the same character of acts which Congress in section 20 of the Clayton Act of October 15, 1914, sought to restrict from the operation of injunctions, but because of the interpretations placed by the courts on this section of the Clayton Act, the restrictions as contained therein have become more or less valueless to labor, and this section is intended by more specific language to overcome the qualifying effects of the decisions of the courts in this respect.

As an example of the manner in which the courts have interpreted this section of the Clayton Act which is responsible in part for this agitation for further legislation, we beg leave to cite the following cases.

In the case of Duplex Printing Press Co. *v.* Deering (254 U. S. 443), decided January 3, 1921, and being a six to three decision, the court held so far as pertinent to this particular discussion that this section of the Clayton Act provided a restriction upon the use of the injunctions in favor only of the immediate disputants and that other members of the union not standing in the proximate relation of employer and employee could be enjoined. Of course, it is fundamental that a strike is generally an idle gesture if confined only to the immediate disputants. This is intended to be remedied by the later provision in this act defining the meaning of the term, "person participating in a labor dispute," as to whom, as in the bill defined,

the courts are deprived of jurisdiction to issue injunctions in the specified instances set forth in this section.

In the case of the American Steel Foundries Co. *v.* Tri-City Central Trades Council, supra, there was a strike, and, of course, a picket line. There was practically no fraud or violence but the persistent giving of publicity to the facts involved in the dispute and the persistent advising of other persons without fraud or violence not to work for the employer. It was thought by the labor union that section 20 prohibited an injunction against such acts, but the Supreme Court held that such acts could be enjoined, and, therefore, the legislation proposed specifically restricts the courts in this respect unless the acts are accompanied by fraud or violence.

Section 5: This section provides that no United States court shall have jurisdiction to issue an injunction upon the ground that the persons participating in a labor dispute are engaging in an unlawful combination because of the doing in concert of the acts enumerated in section 4.

This section is included principally because many of the objectionable injunctions have been issued under the provisions of the antitrust laws, a necessary prerequisite for invoking the jurisdiction of which is a finding of the existence of a conspiracy or combination and without which no injunction could have been issued. For example, in the case of Bedford Cut Stone Co. *v.* Journeymen Stone Cutters' Association (274 U. S. 37), a 7 to 2 decision, where there was simply a rule by the association forbidding the members from working on the "unfair" stone of the complainant, the Supreme Court held that while it was lawful for members independently to refuse to work, when they refused in concert it became a combination, and when this unreasonably interfered with interstate commerce, it could be enjoined under the antitrust laws, resulting in the members being enjoined from refusing to work.

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Section 6: Section 6 provides that no employee of any organization and no organization participating in a labor dispute shall be held liable for the unlawful acts of individual members, except upon clear proof of actual authorization of such acts. This section speaks for itself and is desirable because both individuals and associations have been held liable for unlawful acts of overzealous members which acts were neither authorized nor ratified by the officer or association and were entirely without the scope of any authority committed by the officer or association of the offending member.

This provision does not affect the general law of agency, and it is necessary, under the circumstances, that the courts should know that Congress expects them not to hold officers or associations liable for the unlawful acts of a member without clear proof of actual participation in, or authorization of, any unlawful acts by the officer or association.

Section 7: This section is largely procedural and restrictive in character. The fairness of this section can not reasonably be disputed. It simply provides that no court shall have jurisdiction to issue an injunction in cases growing out of a labor dispute except after hearing the testimony of witnesses in open court with an opportunity for cross-examination and except after findings of fact by the court that unlawful acts have been committed and will be continued unless restrained, that irreparable injury to the complainant's property will follow, that as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief, that complainant has no adequate remedy at law, and that the public officers charged with the duty of protecting complainant's property are unable or unwilling to furnish adequate protection.

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As will be noted, this is to prevent courts from issuing injunctions without making a finding of facts or where the unlawful acts are only threatened and where no substantial injury will follow, or where the injury always done by granting the relief is outweighed by the injury which would be inflicted by the denial of the relief, or where the public officers fail in their duty. The last provision is considered desirable, because it often happens that complainants rush into a Federal court and obtain an injunction the enforcement of which requires the court to consider and punish acts which are and ought to be, under our system of government, cognizable in the local tribunals. Our Federal courts already are congested with cases ordinarily cognizable in the local police courts, for example, the multitude of cases growing out of the prohibition act; and the granting of injunctions in many cases results in further congestion because the Federal courts are required to punish as contempts acts which are clearly local police-court matters.

The other provisions of this section hardly require any particular discussion, because they relate to the giving of notice, the length of time that a temporary restraining order shall be effective, the necessity for giving an undertaking with surety, the recompense for damages caused by the erroneous issuance of injunctions, and the like; all of which are generally considered necessary and reasonable when the extraordinary injunctive arm of the court is brought into play with the serious consequences of injury which the improvident issuance of an injunction frequently produces.

Section 8: This section prohibits any injunctive relief where the parties have failed to make every reasonable effort to settle, or have failed to comply with any obligation imposed by law, or have failed to invoke the aid of any available governmental machinery for mediation.

There can be no reasonable objection to this section because it is universally believed that disputes should be settled without resort to courts wherever possible, and the settlement of disputes by conciliation and arbitration, instead of by strikes, has become the rule rather than the exception.

Section 9: This section provides for findings of fact by the court which must be filed in the record of the case prior to the issuance of any injunctive order, and also provides that every injunctive order growing out of a labor dispute shall include only a prohibition of such specific acts as are expressly complained of and expressly included in the findings of fact made and filed by the court. This section is designed to require the court to find as a fact the existence of the acts enjoined and to prevent the enjoining of acts which are not complained of—clearly a deterrent to prevent the very harsh inclusive injunctive orders which are sometimes encountered and which go, by the embracive character of the decree, beyond allegations of the complaint or the facts adduced. This is clearly a reasonable restriction and unobjectionable.

Section 10: Section 10 provides for a speedy appeal, which is highly desirable in view of the extremely important issues which disputes of this kind involve. This section also gives these cases precedence in the appellate courts, and contains a provision somewhat similar to the provision of the statute in relation to the orders of the Interstate Commerce Commission, wherein it is provided that such proceedings shall be given precedence over all cases pending therein and shall be in every way expedited. (Sec. 21, title 15, U. S. C.)

Section 11: Section 11 provides that in cases in which a person shall be charged with contempt for violating injunctive orders the accused shall enjoy the right to a

speedy and public trial by a jury and also provides that this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice, etc. That Congress has authority to provide for such a trial by jury has been upheld by the Supreme Court of the United States in the case of Michaelson *v.* U. S. ex rel. Chicago, St. Paul, Milwaukee & Omaha Railway Co. (266 U. S. 42), wherein the Supreme Court upheld a similar provision contained in section 21 of the Clayton Act.

Section 12: Section 12 provides that the defendant in any contempt proceeding may file with the court a demand for the retirement of the judge, if the contempt arises from an attack upon the conduct of said judge, and occurred other than in the presence of the court or so near thereto as to interfere directly with the administration of justice, and that upon filing of any such demand the judge is compelled to proceed no further. This is desirable because in some instances the presiding judges have had such pronounced views in labor disputes as to make impossible a fair and impartial hearing.

Section 13: Section 13 contains definitions which speak for themselves. It is hardly necessary to discuss them other than to say that these definitions include, as hereinabove stated, a definition of a person participating in a labor dispute which is broad enough to include others than the immediate disputants and thereby corrects the law as announced in the case of Duplex Printing Press Co. *v.* Deering, supra, wherein the Supreme Court reversed the circuit court of appeals and held that the inhibition of section 20 of the Clayton Act only related to those occupying the position of employer or employee and no others. The Supreme Court held to the same effect in the case of the American Steel Foundries Co. *v.* Tri-City Central Trades Council, supra.

The definitions, also, as above stated, limit the act to courts of the United States whose jurisdiction has been conferred or limited by act of Congress; that is to say, the inferior Federal courts.

Section 14: Section 14 is the usual provision to the effect that if any provision is held to be unconstitutional the remaining provisions shall not be affected thereby.

Section 15: Section 15 is the usual provision repealing acts in conflict with the provisions of this act.

States Having Enacted Anti-Injunction Legislation

In the following States legislation has been enacted governing the so-called "anti-injunction laws": Illinois, Kansas, Minnesota, Montana, New Jersey, North Dakota, Oregon, Pennsylvania, Utah, Washington, and Wisconsin.

In four of the States (Kansas, Minnesota, Pennsylvania, and Wisconsin) the law specifically provides that no injunction shall be issued without previous notice and an opportunity to be heard in open court. The State of Wisconsin, by chapter 376 of the acts of 1931, enacted a law defining the public policy of the State relative to collective bargaining. This act creates a new section relating to litigation growing out of the labor disputes and limiting the jurisdiction of courts sitting in equity. Section 268.23 concerns the conditions of issuance of injunctions and restraining orders. This section provides that no court shall have jurisdiction to issue an injunction in any case involving a labor dispute except after the testimony of witnesses in open court and with an opportunity for cross-examination.

On October 15, 1914, the Congress of the United States enacted the Clayton Act. Prior to the enactment of this law, several States had already enacted provisions similar to those contained in section 20 of the Clayton Act. The

following States have similar provisions: North Dakota, Oregon, Utah, Washington, and Wisconsin.

In addition to the above States which have enacted laws restricting the use of injunctions three other States (Illinois, Montana, and New Jersey) have enacted laws, although similar in many respects to the Clayton Act, differ in the exact wording of the law. (Credit for the research of State statutes on the subject is due the Bureau of Labor Statistics of the United States Department of Labor.)

In conclusion, it is repeated that the proposed bill is designed primarily as a practical means of remedying existing evils, and limitations are imposed upon the courts in that class of cases wherein these evils have grown up and become intolerable. This is a reasonable exercise of legislative power, and in order that the limitation may not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes, the bill undertakes specifically to designate those persons who are entitled to invoke the protections of the procedure required.

APPENDIX

Many Members of the House who are lawyers have given this subject a great deal of consideration, and have expressed their interest in the question of the power of Congress over equity jurisdiction of the Federal courts. A very interesting and scholarly memorandum was prepared on this subject by Prof. Felix Frankfurter, of the Harvard Law School, and coauthor of a recognized and authoritative work The Labor Injunction (Frankfurter & Greene, 1930), in which members will find not only the historical background but an abundance of judicial precedents and decisions on the subject.

Power of Congress Over Equity Jurisdiction of the Federal Courts

Congressional power over Federal equity jurisdiction is an aspect of Federal legislative power over the Federal judiciary generally. Accordingly this memorandum will treat the broader question first. But since it may be true in the law, if not elsewhere, that the whole does not always include its parts, consideration will then be given to the question whether there is anything in the nature of Federal equity jurisdiction which clothes it with special immunities.

A. **Congressional power over the Federal courts generally.**—The provisions of Article III, section 2 of the Constitution, defining the scope of "the judicial power," are not self-executing. Section 1 of the same article provides:

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

The extent to which the judicial power shall be vested in such inferior courts rests with Congress, which brought them into being. There has never been a time when the full limit of Federal judicial power has been given to the lower Federal courts. Not until 1875, except for the 1-year existence of the act of 1801, were the courts given jurisdiction over "cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties • • • " (18 Stat. 470; U. S. Comp. Stat. (1916) sec. 991 *et seq.*). Jurisdiction based on diversity of citizenship existed from the beginning, subject, however, to certain limitations, such as the necessary amount in controversy and the prohibition against suit by an assignee where the assignor could not have availed himself of Federal jurisdiction. The act of 1887-88 limited the privilege of removal

to nonresident defendants, regardless of the existence of diversity of citizenship in other cases (24 Stat. 552; 25 Stat. 433; U. S. Comp. Stat. (1916) secs. 991 (1), 2954-58). These are simply major landmarks in the delimitation by Congress of the scope of judicial power. A full collection of statutes by which Congress exercised authority over the establishment, jurisdiction, powers and procedure of the Federal courts is contained in Frankfurter and Landis' Power of Congress over Procedure in Criminal Contempts in Inferior Federal Courts — A Study in Separation of Power (1924), (37 Harvard Law Rev. 1010, 1059, 1100).

Judicial recognition of this authority has been expressed from the time of Chief Justice Ellsworth to our day. The following, arranged chronologically, are typical:

> Ellsworth, C. J., in Turner *v.* Bank (4 Dall. 8 (1799)) "A circuit court, however, is of *limited* jurisdiction, and has cognizance, not of cases generally, but only of a few special circumstances, amounting to a small proportion of the cases, which an unlimited jurisdiction would embrace."
>
> Daniel, J., in Cary *v.* Curtis (3 How. 236, 245 (1845)) (upholding statute forbidding action against collector to recover duties paid under protest): "Secondly, in the doctrine so often ruled in this court, that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction, either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good • • •. The existence of the judicial act itself, with its several supplements, furnishes proof unanswerable on this point. The courts of the United States are all

limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law."

Grier, J., in Sheldon *v.* Sill (8 How. 441, 449 (1850)) (upholding assignee clause of judiciary act): "The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the circuit court; consequently, the statute which does prescribe the limits of their jurisdiction, can not be in conflict with the Constitution, unless it confers powers not enumerated therein."

Swayne, J., in Mayor *v.* Cooper (6 Wall. 247, 252 (1867)) (upholding statute allowing removal in single class of cases involving law of Congress): "As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it."

Field, J., in Ex parte Robinson (19 Wall. 505, 510-511 (1873)) (upholding statute limiting summary power to punish for contempt): "The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power (to punish for contempt). But the power has been limited and defined by the act of Congress of March 2, 1831. The act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt. But that it applies to the circuit and district courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction."

Miller, J., in United States *v.* Union Pac. R. R. (98 U. S. 569, 603): "We say therefore, that, with the exception of the Supreme Court the authority of Congress, in creating courts and conferring on them all

or much or little of the judicial power of the United States, is unlimited by the Constitution."

Fuller, C. J., in Ex parte Wisner (203 U. S. 449, 455): "The Supreme Court alone possesses jurisdiction derived immediately from the Constitution, and of which the legislative power can not deprive it • • •; but the jurisdiction of the circuit courts depends upon some act of Congress."

Sutherland, J., in Kline v. Burke Const. Co. (260 U. S. 226, 233-34 (1922)): "The right of a litigant to maintain an action in a Federal court on the ground that there is a controversy between citizens of different States is not one derived from the Constitution, unless in a very indirect sense. Certainly it is not a right granted by the Constitution. The applicable provisions, so far as necessary to be quoted here, are contained in Article III • • •. The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates • • • That body may give, withhold, or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution • • • And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part. • • •"

Taft, C. J., in Myers v. United States (272 U. S. 52, 129-30 (1926)) (on a suggested analogy between the power of Congress over lower Federal courts and over removal of inferior officers): "By the second section of article 3 the judicial power is extended to all cases in law and equity under this Constitution and to a substantial number of other classes of cases. Under the accepted construction the cases mentioned in this section are treated as a description and reservoir of the judicial power of the United States and a boundary of that power as between the United States and the States, and the field of jurisdiction within the limits of which Congress may vest particular jurisdiction in any one inferior Federal court which it may constitute."

Against this current of authority can be set only certain statements of Story, J., bred of his militant federalism. Thus, in Martin *v.* Hunter's Lessee (1 Wheat. 304, 330 (1816)), he said:

> If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty of Congress to vest the whole judicial power.

But this was simply a statement of personal views; at page 337 of the case he recognizes that the decision need not be placed on any such iconoclastic ground. For other expressions of Story's political philosophy see 1 Story, Life and Letters of Joseph Story (1851) 293. Compare also his insistence that the power of Congress over interstate commerce was "exclusive," another facet of his federalist philosophy. Dissenting in Mayor *v.* Miln (11 Pet. 102 (1837)). Story's opinion is a maverick in the judicial fold.

Nowhere has the matter been more succinctly put than in an address of the late Chief Justice Taft before the American Bar Association in 1922:

> But of course the taking away of fundamental jurisdiction from the Federal courts is within the power of Congress and it is not for me to discuss such a legislative policy (47 Rep. A. B. A. (1922) 250, 259).

B. **Power of Congress over Federal equity jurisdiction.**— Apart from the seventh amendment, probably no question would arise of the power to affect equity jurisdiction were it not for certain statements in the books that Federal equity jurisdiction is like that existing in England in 1789. (See e. g., Boyle *v.* Zacharie, 6 Pet. 648, 658 (1832); Payne *v.* Hook, 7 Wall. 425, 430 (1868); McConihay *v.* Wright, 121 U. S. 201, 206 (1887).) These statements, however, must be read in the light of the problem to which they were addressed. They express the formula by

which a uniform equity jurisdiction was established for the Federal courts despite the great divergences in the practice of the States at the time of the Constitution. Of the 13 States, 5 had separate courts of chancery, 3 had no chancery courts, but certain equity powers were given to the common-law courts, 2 had common-law courts with a very few limited equity powers, 1 had only common-law courts, and in 2 the legislature exercised some chancery powers. (See The Federalist, No. 83; Warren, New Light on the History of the Judiciary Act (1923), 37 Harvard Law Rev. 49, 96-101.) It is to express the independence of Federal equity from that of the States, not from congressional control, that the formula has been used. The cases in which it has been employed all involved the effect of State relaxation of the dichotomy of law and equity. It is frequently said that the States can neither enlarge nor diminish the equity jurisdiction of the Federal courts, e. g., Cates *v.* Allen (149 U. S. 451); Mississippi Mills *v.* Cohen (150 U. S. 202). Yet even here growth and change have been possible, for it is held that a new "right" created in equity by a State, as distinguished from a new equitable remedy, will be enforced in the Federal courts. (See a recent discussion of this question in Henrietta Mills *v.* Rutherford County, 281 U. S. 121 (1930).)

Even in these cases dealing with State practice, the Supreme Court has often been careful to advert to the part which Congress plays in shaping Federal equity jurisdiction. See, for example, the following:

> Marshall, C. J., in United States *v.* Howland (4 Wheat. 106 (1819) at p. 115): "• • • and as the courts of the union have a chancery jurisdiction in every State, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other States."
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> Curtis, J., in Neves *v.* Scott (13 How. 268, 272 (1851)): "But in all the States the equity law, recog-

> nized by the Constitution and by acts of Congress, and modified by the latter, is administered by the courts of the United States, and upon appeal by this court."

Perhaps the most suggestive characterization of the relation of the practice of the high court of chancery to Federal equity practice is contained in a statement of McLean, J., in Pennsylvania *v.* Wheeling Bridge Co. (13 How. 518, 563 (1851)):

> This may be said to be the common law of chancery, and since the organization of the Government it has been observed.

Indeed, on at least one occasion the court felt constrained to point out that there was a body of principles of equity apart from laws of Congress:

> It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress. The principles of equity exist independently of and anterior to all Congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases. (Brewer, J., in United States *v.* Detroit Lumber Co., 200 U. S. 321, 339 (1906).)

But reliance need not be had on general statements. Congress has actually affected the scope of equity jurisdiction. In 1911 an important step was taken in the direction of a union of law and equity, by virtue of the statute allowing equitable defenses to be pleaded in an action at law, and equitable relief to be sought by way of answer to an action at law. (Judicial Code, sec. 274b, 38 Stat. 956; 28 U. S. C., sec. 398). Discussing this provision in an address referred to above, Chief Justice Taft said:

> Already under the Federal code, there is a statutory provision which has not yet been much con-

> sidered by the courts, by which an equitable defense may be pleaded to a suit at law. If we may go so far, it is a little difficult to see why the distinction between the two courts may not be wholly abolished, and the constitutional right of trial by jury retained unaffected (47 Rep. A. B. A. (1922) 250, 260).

Three months later the Chief Justice had occasion to echo these remarks in the course of an opinion:

> Section 274b is an important step toward a consolidation of the Federal courts of law and equity, and the questions presented in this union are to be solved much as they have been under the State codes. (Liberty Oil Co. v. Condon Bank, 260 U. S. 235 (1922).)

More particular instances are at hand. Since 1793 Congress has prohibited the granting of an injunction to stay proceedings in any court of a state, except in bankruptcy. (1 Stat. 334 (1793); 36 Stat. 1162 (1911); 28 U. S. C., sec. 379; Judicial Code, sec. 265.) Since 1867 Congress has forbidden suits to restrain the assessment or collection of any tax. (14 Stat. 475; 26 U. S. C., sec. 154.) This provision was recently extended to include transferees of a taxpayer. (45 Stat. 873 (1928), 26 U. S. C., sec. 2604, upheld in Phillips *v.* Commissioner, 283 U. S. 589 (1931).)

A related question was presented by sections 21 and 22 of the Clayton Act, requiring a jury trial in certain classes of contempts. During the course of the debates in the House, John W. Davis, then a Member from West Virginia, summarily dealt with the question:

> It has been hinted, not argued, that this measure goes beyond the constitutional power of Congress as to the courts * * *. I must content myself with a mere quotation again from the Supreme Court of the United States in the case of In re Robinson (19 Wall. 505), having reference to the power to punish for contempt. * * * (See quotation on p. 3, supra; 48 Cong. Rec., pt. 7, p. 6441 (1912).)

The provision was upheld in Michaelson *v.* United States (266 U. S. 42 (1924)). Certain statements of Mr. Justice Sutherland in that case call for a word of comment. Superficially they seem to run counter to the current of authority already cited, e. g., the dictum that "If the statute now under review encroaches upon the equity jurisdiction intended by the Constitution, a grave constitutional question in respect of its validity would be presented; * * *." How the intent of the Constitution is to be determined is not stated. But the whole context indicates that the difficulty present to the mind of Mr. Justice Sutherland was that Congress might deprive the court of powers necessary to its proper functioning. This is the statement of the result of the case by the late Judge Rose of the fourth circuit:

> As all the inferior Federal courts are the creatures of Congress, the latter has the right to restrict their jurisdiction over contempts as well as over other matters, provided it leaves them still able to function as courts.

If the dictum of Mr. Justice Sutherland means more than this, it can hardly be reconciled with the views expressed by Chief Justice Taft. Judge Rose's view is found in his Federal Jurisdiction and Procedure (1926 ed., p. 35).

Indeed, real limits on congressional power do derive from the traditional ideas of the proper functions of a court. Independence of judgment must not be interfered with; thus Congress may not, under the guise of a jurisdictional rule, prescribe an arbitrary rule of decision on the merits. (United States *v.* Klein, 13 Wall. 128 (1871).) Nor may Congress place finality of judgment in the executive department after a decision by the courts. (Gordon *v.* United States, 117 U. S. 697 (1864).) Nor may courts be given the duty of passing upon matters which

other branches of the Government are peculiarly adapted to decide. (Oetjen v. Central Leather Co., 246 U. S. 297 (1918) (recognition of foreign government), Keller *v.* Potomac Electric Power Co., 261 U. S. 428 (1923) (rate fixing).) These are the types of cases in which the power of Congress over the judiciary has been successfully controverted.

C. **Conclusion.**—The power of Congress over the equity powers of the lower Federal courts is implied in congressional power over these courts generally, as exercised in the whole series of judiciary acts, and as recognized by a continuous current of judicial authority. The immunity of Federal equity powers to change is a doctrine for the preservation of uniformity and is directed at the effects of varying State practice; even here, however, some inroads have been made where the State law creates a new "right." The authority of Congress to establish a union of law and equity, preserving the right to jury trial where proper, has been recognized by high authority. Congress has prohibited injunctive relief in certain classes of cases. The acts of Congress which have been held unconstitutional, dealing with judicial powers, have violated the traditional canons of judicial functions. No act of Congress has been held unconstitutional on the ground that it interfered with Federal equity powers. For Congress itself to hesitate on this ground would seem to be a paradoxical bit of self-abnegation.

CALENDAR NO. 176

72d Congress, 1st Session | SENATE | Report No. 163

TO DEFINE AND LIMIT THE JURISDICTION OF COURTS SITTING IN EQUITY

February 4, 1932.—Ordered to be printed

Mr. Norris, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 935]

The Committee on the Judiciary, to which was referred the bill (S. 935) to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes, having had the same under consideration, beg leave to report as follows:

We recommend that the bill be amended as hereinafter set forth, and, as so amended, that the bill be passed.

The following amendments are recommended:

1. On page 2, line 10, after the word "wherefore", insert the following: "though he should be free to decline to associate with his fellows".

2. On page 3, line 1, after the word "enforceable", insert the words "in any court of the United States".

3. On page 3, line 3, after the word "any", insert the word "such".

4. On page 3, line 3, after the word "court", strike out the words "of the United States".

5. On page 3, line 2, strike out the word "cases" and insert, in lieu thereof, the words "any case".

6. On page 8, line 25, after the word "proceedings", insert the words "and on his filing the usual bond for costs".

7. On page 9, line 1, after the word "certify", insert the words "as in ordinary cases".

8. On page 9, line 1, strike out the word "entire".

9. On page 9, line 1, after the word "case", strike out the words "including a transcript of the evidence taken".

10. On page 9, line 9, strike out the word "where" and insert, in lieu thereof, the words "in which".

11. On page 9, line 10, strike out the words "indirect criminal".

12. On page 9, line 15, strike out the word "requirement" and insert, in lieu thereof, the word "right".

13. On page 9, line 15, after the word "not", strike out the words "be construed to".

14. On page 9, line 22, after the word "court", where it first appears in said line, strike out the words "is authorized to" and insert, in lieu thereof, the word "may".

15. On page 10, line 1, after the word "the", strike out the word "attack" and insert, in lieu thereof, the word "contempt".

16. On page 10, line 1, after the word "occurred", strike out the word "otherwise" and insert, in lieu thereof, the word "elsewhere".

17. On page 10, line 2, strike out the words "open court" and insert in lieu thereof the words "the presence of the court or so near thereto as to interfere directly with the administration of justice".

18. On page 10, line 4, after the word "as", insert the word "is".

19. On page 10, line 4, after the word "provided", strike out down to and including the word "Code" in line 6, and insert in lieu thereof the words "by law".

20. On page 11, line 15, strike out the word "and" and insert in lieu thereof the word "or".

21. On page 11, line 24, after the word "any", strike out the word "provisions" and insert in lieu thereof the word "provision".

22. On page 11, line 24, after the word "act", strike out down to and including the word "circumstance" in line 25.

23. On page 11, line 25, after the word "held", insert the words "unconstitutional or otherwise".

24. On page 12, line 1, after the word "the" where it first appears in said line, strike out the word "remainder" and in lieu thereof insert the words "remaining provisions".

25. On page 12, line 1, after the word "act", strike out down to and including the word "circumstances" in line 2, page 12.

The Committee on the Judiciary has been considering the subject of injunctions in labor disputes for several years, and this bill is a result of such study and consideration.

In the Seventieth Congress, on December 12, 1927, the Senator from Minnesota, Mr. Shipstead, introduced a bill on the subject (S. 1482). From that time to the present the Judiciary Committee, in one form or another, has had under consideration the question of limiting the jurisdiction of Federal courts in granting injunctions in labor disputes.

In the Seventieth Congress the bill referred to (S. 1482) was referred to a subcommittee consisting of the Senator

from Wisconsin, Mr. Blaine; the Senator from Montana, Mr. Walsh; and the writer. This subcommittee held extensive and unlimited public hearings upon the bill. No limit was placed upon the hearings, and those who favored the legislation and those who were opposed to the legislation were heard without limitation.

At the close of the hearings this subcommittee, in executive session, went over the hearings and discussed all phases of the proposed legislation. The subcommittee was unanimous in reaching the conclusion that some legislation on this subject was absolutely necessary in the public interest; but it likewise reached the conclusion that the bill under consideration did not fully meet the requirements.

After further consideration this subcommittee called into consultation economists and attorneys who had made a special study of this particular subject. They invited Prof. Felix Frankfurter, of the law school of Harvard University, Cambridge, Mass.; Herman Oliphant, former professor of law at Columbia University, now a member of the faculty of the institute of law, the Johns Hopkins University, Baltimore, Md.; Prof. Francis B. Sayre, law school of Harvard University, Cambridge, Mass.; Mr. Edwin E. Witte, chief of the legislative reference library, Madison, Wis.; and Hon. Donald R. Richberg, attorney, of Chicago, Ill., to meet with the subcommittee for the purpose of giving further consideration to the subject and drafting proper legislation. As a result of such consultation and deliberation, the subcommittee prepared a substitute bill which, in its essential and material particulars, is practically the same as the bill now reported to the Senate (S. 935).

The subcommittee reported this substitute to the full Committee on the Judiciary. After this report was made and after considerable consideration by the full Committee, various attorneys representing interests opposed to the

enactment of the proposed bill requested further hearings upon the substitute bill recommended by the subcommittee.

The Committee on the Judiciary, after considerable discussion, thereupon referred the entire matter back to the subcommittee, with instructions to hold further hearings upon the proposed substitute. In accordance with these directions, the subcommittee again held public hearings and gave to all persons who so desired an opportunity to be heard. At the close of the hearings, the subcommittee again reported the bill to the full committee, with the recommendation that the substitute be agreed to and that the bill, as thus amended, be favorably reported to the Senate.

The proposed bill was the subject of consideration and discussion in the full committee for several weeks, but no final action was taken by the full committee during that session of the Seventieth Congress. At the second or short session of the Seventieth Congress, the bill was again taken up by the full committee, but no conclusion was reached and at the final adjournment of the Congress the bill died upon the calendar of the committee without any action thereon.

At the beginning of the regular session of the Seventy-first Congress, on the 9th day of December, 1929, the Senator from Minnesota, Mr. Shipstead, again introduced his bill, this time known as S. 2497, which bill was in practically the same form as the bill, S. 1482, of the Seventieth Congress.

The Judiciary Committee referred the bill to the same subcommittee which had handled the matter in the Seventieth Congress. This subcommittee, having given such extensive hearings and consideration to the bill in the Seventieth Congress, did not feel that additional hearings were necessary. Nevertheless, upon application of attorneys representing corporations and organizations opposed to the enactment of this kind of legislation, limited

hearings were again held and all interested parties were permitted to file written briefs.

The subcommittee, after giving further consideration to the subject, and after making several amendments to the substitute bill previously prepared by the subcommittee, again reported the bill to the full committee with the recommendation that the amended substitute be agreed to and that the bill, as thus amended, be favorably reported to the Senate.

After further consideration by the full committee upon the report of the subcommittee, the substitute proposed by the subcommittee was amended by the full committee in several respects, but, upon motion to report the bill to the Senate as amended by the proposed subcommittee substitute, with a recommendation that as thus amended the bill be passed, 7 members of the committee voted in favor of such report and 7 members voted against making the report (3 members not voting). Thus the motion to make a favorable report was defeated.

The proposed substitute bill, however, was again further considered by the full committee and, as a result thereof, by a majority vote of the committee, the proposed bill was submitted to the Attorney General with the request that he indicate to the committee his views concerning the constitutionality of the proposed legislation and also as to the effect the enactment of such legislation would have upon the United States in cases in which the Government may desire to apply to Federal courts for equitable relief by injunction. After giving the matter consideration, the Attorney General declined to comply with the committee's request and in an official communication so informed the committee.

At the next meeting of the committee the substitute bill was again taken up and, after further discussion, the committee, by a majority vote, decided to make an adverse report upon the bill. The majority report was made by Sen-

ator Steiwer on June 18 (calendar day, June 20), 1930 (71st Cong., 2d sess., Rept. No. 1060). The minority report was filed on the same day and is known as Report No. 1060, part 2.

No action, however, was taken by the Senate upon the bill thus adversely reported and the same died upon the calendar of the Senate upon the adjournment of the Seventy-first Congress.

Soon after the convening of the Seventy-second Congress, on December 9, 1931, the present bill, S. 935, was introduced in the Senate. This bill, for all practical purposes, is the same as the substitute bill reported by the subcommittee in both the Seventieth and the Seventy-first Congresses.

Immediately upon the introduction of the bill various interests opposed to the bill again applied to the committee for further hearings. The committee, however, after considering such applications, reached the conclusion that sufficient hearings had been had, but they did allow all persons interested who desired to do so, to file written briefs upon the subject, limiting the time for the filing of such briefs to the 25th day of January, 1932.

Thereupon the full committee again took up the consideration of the bill and, after many days of consideration in executive session, the amendments heretofore suggested were agreed upon by the committee and, as thus amended, the committee, by a vote of 11 to 6, ordered a favorable report made to the Senate.

The bill, as thus reported, if the amendments suggested by the committee are agreed to, will read as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunc-

tion in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this act.

SEC. 2. In the interpretation of this act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

SEC. 3. Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made,

whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby—

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertis-

ing, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notfying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this act.

SEC. 5. No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination of conspiracy because of the doing in concert of the acts enumerated in section 4 of this act.

SEC. 6. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization, of such acts, or of ratification of such acts after actual knowledge thereof.

SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been committed and will be continued unless restrained;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to those public officers charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days, and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of an injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against

said complainant and surety, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

SEC. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute, either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

SEC. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

SEC. 10. Wherever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings, and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case, to the circuit court of appeals for its review. Upon the filing of such record in the circuit court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceeding precedence over all other matters except older matters of the same character.

DEFINE JURISDICTION OF COURTS SITTING IN EQUITY

SEC. 11. In all cases in which a person shall be charged with contempt for violation of a restraining order or injunction issued by a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: *Provided*, That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

SEC. 12. The defendant in any proceeding for contempt of court may file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the contempt occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding.

SEC. 13. When used in this act, and for the purposes of this act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or

when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by act of Congress, including the courts of the District of Columbia.

SEC. 14. If any provision of this act is held unconstitutional or otherwise invalid, the remaining provisions of the Act shall not be affected thereby.

SEC. 15. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Thus, after a little more than three years of consideration by the Judiciary Committee, with the assistance of the experts heretofore named, we have reached a point where the committee, by a substantial majority, has made a definite recommendation to the Senate for remedial legislation upon this very much controverted subject.

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The limitation of the jurisdiction of Federal courts to issue injunctions in labor disputes has been a subject of public discussion for many years. It is fair to say that public sentiment on the subject has reached the conclusion that some such limitation is absolutely necessary. Both of the great political parties in their last national platforms have promised remedial legislation upon the subject. The last Republican National Convention at Kansas City adopted a plank on the subject as follows:

> The party favors freedom in wage contracts, the right of collective bargaining by free and responsible agents of their own choosing, which develops and maintains that purposeful cooperation which gains its chief incentive through voluntary agreement.
>
> We believe that injunctions in labor disputes have in some instances been abused and have given rise to a serious question for legislation.

Following this, the last Democratic National Convention at Houston, Tex., in its platform, made the following provises:

> (*a*) We favor the principle of collective bargaining and the Democratic principle that organized labor should choose its own representatives without coercion or interference.
>
> (*b*) Labor is not a commodity. Human rights must be safeguarded. Labor should be exempt from the operation of antitrust laws.
>
> (*c*) We recognize that legislative and other investigations have shown the existence of grave abuse in the issuance of injunctions in labor disputes. No injunctions should be granted in labor disputes except upon proof of threatened irreparable injury and after notice and hearing, and the injunction should be confined to those acts which do directly threaten irreparable injury. The expressed purpose of representatives of capital, labor, and the bar to devise a plan for the elimination of the present evils with respect to injunctions must be supported and legislation designed to accomplish these ends formulated and passed.

It is, therefore, a nonpartisan question, and, assuming that both of these great political parties in their national conventions were acting in good faith, it follows that either this bill or some other legislation of similar import, carrying out the pledges made to the people of the United States, should be promptly enacted.

The injunction process is an extremely harsh remedy. Particularly is this true when a restraining order is issued without any notice to any of the defendants; and in nearly every case in a labor dispute where an injunction is issued, the restraining order is the first step. The first knowledge which the defendant has is service of notice upon him that the restraining order has already been issued. Before he is given an opportunity to be heard, he is enjoined, and in most cases he is restrained from doing acts and things which seriously interfere with, and sometimes completely deny, his fundamental right of liberty of action, which belongs to every free citizen.

That there have been abuses of judicial power in granting injunctions in labor disputes is hardly open to discussion. The use of the injunction in such disputes has been growing by leaps and bounds.

It is impossible to report with accuracy the number of injunctions issued in either the State or Federal courts in connection with labor disputes in recent years. Only a small percentage of these injunction cases are reported officially. For example, approximately 300 were issued in connection with the railway shopmen's strike of 1922, but only 12 were officially reported (Frankfurter on "The Labor Injunction," p. 52).

In testimony before the committee the president of the American Federation of Labor submitted a partial list of 389 labor injunctions in State and Federal courts during the last decade, most of which are unreported. (Hearings, February, 1928, pp. 77-86.) Out of over 260 cases listed

by the Massachusetts Bureau of Statistics in the period of 1898-1916, only 18 were officially reported (p. 51). A large majority of injunction proceedings are never carried beyond a restraining order or temporary injunction and, therefore, are unlikely ever to reach the stage of official reporting, which is concerned largely with final decrees and with decisions of appellate courts. Therefore, exact statistics can not be presented, but the statement can be safely made that since 1890, when labor injunctions were practically unknown, their issuance has steadily increased until there are few controversies of substantial importance between employers and employees in which one or more injunctions will not be issued out of either a State or a Federal court.

The right of wage earners to organize and to act jointly in questions affecting wages, conditions of labor, and the welfare of labor generally is conceded and recognized by all students of the subject. An increasing necessity for the organization of labor has been brought about by modern economic conditions and methods of doing business, which have in the main been developed by the aid of governmental authority.

It is obvious that existing conditions under which large employers of labor possess unprecedented power to dictate contracts and conditions of employment have been developed through governmental grants of authority to form corporations and organizations of corporations, whereby thousands of owners of property are enabled to combine hundreds of millions of dollars of capital and, in this way, substantially to control and sometimes to monopolize opportunities for employment. Such a power, unrestrained by the organization of labor, would permit employers arbitrarily to fix the wages and conditions of labor under which millions of men and women would find their only opportunity to earn a living.

A single laborer, standing alone, confronted with such

far-reaching, overwhelming concentration of employer power, and compelled to labor for the support of himself and family, is absolutely helpless to negotiate or to exert any influence over the fixing of his wages or the hours and conditions of his labor. A man must work in order to live. If he can exercise no control over his conditions of employment, he is subjected to involuntary servitude.

The efforts of the workers to preserve their freedom of association and their freedom in association to influence the fixing of wages and working conditions present questions which are unique and demand specific legislative action. The situation has been very well described by Chief Justice Taft in the opinion of the court delivered by him in American Foundries *v.* Tri-City Council (257 U. S. 184, at p. 209), reading in part as follows:

> • • • Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. • • • They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. • • •. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint products of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood.

The foregoing opinion is cited with approval in the unanimous opinion of the Supreme Court handed down May 26, 1930, in Texas & New Orleans Railroad Co. *v.* Brotherhood of Railway & Steamship Clerks, in support of the following statement in the opinion by Mr. Chief Justice Hughes:

> The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work (citing the Tri-City case). Congress was not required to ignore this right of the employees, but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife.

If we concede, as we must, that labor has the right to combine for the lawful purpose of securing employment and has likewise the right to combine for the purpose of securing increased wages or bettering conditions of labor, then it follows, as the late Chief Justice Taft has so well stated, that the strike becomes a lawful instrument in the economic struggle between employer and employee. It would be hypocrisy, however, to concede these rights to labor and then to prohibit any effective exercise of these rights by labor. The primary object of the proposed legislation is to protect labor in the lawful and effective exercise of its conceded rights—to protect, first, the right of free association and, second, the right to advance the lawful object of association.

No one will seriously doubt the right of Congress, under the Constitution, to limit the jurisdiction of Federal courts. The jurisdiction, for instance, of the district courts of the United States is given by act of Congress. All the courts of the United States except the Supreme Court could be entirely abolished by act of Congress, and, while Con-

gress could not give to these inferior courts jurisdiction greater than is provided by the Constitution, it could, on the other hand, within the limits of the Constitution, give to the inferior courts such jurisdiction as Congress in its wisdom deems just. It follows, also, that having given this jurisdiction, it can, by act of Congress, take away all or any part of it. This has been clearly held by the Supreme Court of the United States in Myers *v.* United States (272 U. S. 52). At page 130 the Supreme Court said:

> • • • It is clear that the mere establishment of a Federal inferior court does not vest that court with all the judicial power of the United States as conferred in the second section of Article III but only that conferred by Congress specifically on the particular court. It must be limited territorially and in the classes of cases to be heard; and the mere creation of the court does not confer jurisdiction except as it is conferred in the law of its creation or its amendments.

In an earlier case the Supreme Court held:

> The judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. (Cary *v.* Curtis, 3 How. 235 (U. S.) at 244.)

In a fairly recent case, the Supreme Court, construing the power of the inferior Federal courts to exercise jurisdiction over controversies between citizens of different States, pointed out that:

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The right of a litigant to maintain an action in a Federal court (on this ground) is not one derived from the Constitution of the United States, unless in a very indirect sense.

And continued:

> Certainly, it is not a right granted by the Constitution. • • • The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. • • • A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, can not well be described as a constitutional right. (Kline *v.* Burke Construction Co., 260 U. S. 226, 233.)

Public Policy

Relief by injunction is an extraordinary and harsh remedy. It should not be resorted to except in cases where such action is imperatively demanded; and yet injunctive relief is often the only adequate and effective relief against many wrongs and to prevent many irreparable injuries in controversies of infinite variety.

It is not sought by this bill to take away from the judicial power any jurisdiction to restrain by injunctive process unlawful acts or acts of fraud or violence. In order to assist the courts in the proper interpretation of the proposed legislation, it has been attempted to declare, by act of Congress, the public policy of the United States in relation to labor disputes and the issuing of injunctions in connection therewith. This is done in section 2 of the proposed substitute bill, as follows:

> • • • Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless

to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

It is believed that the public policy of the United States thus declared is free from any possible objection and fundamentally beyond criticism if we desire to give those who labor equal opportunity in the economic world with the employers of labor.

In the case of Texas & New Orleans Railroad Co. *v.* Brotherhood of Railway & Steamship Clerks, decided May 26, 1930, previously quoted, the court had under consideration the provision of the railway labor act, confirming in railway employees the right of self-organization "free from the interference, influence or coercion" of employers. It will be noted that this right of employees, written into the railway labor act, is the same right which is affirmed in the declaration of public policy in the proposed bill, which affirms, in section 2, the employee's "full freedom of association, self-organization and designation of representatives of his own choosing," and provides that the employee "shall be free from the interference, restraint, or coercion of employers of labor." Therefore, the decision of the Supreme Court of May 26, 1930, sustaining the constitutionality and the enforceability of this right of employees under the railway labor act, directly and conclusively sustains the constitutionality of the declaration of policy in the proposed bill and the provision of the proposed bill making contracts contrary to such

public policy nonenforceable in the Federal courts. In this most recent opinion, the Supreme Court held:

> Such collective action (of employees) would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.

It is also equally clear that the Congress has the right to declare the public policy of the United States so long as the policy thus declared does not conflict with the Constitution.

Where Congress has not declared the public policy it is within the province of the court to decide what the public policy is, but when such public policy has been declared by Congress it is the duty of the courts to follow such policy and to decide litigated questions related thereto in accordance with the public policy thus declared.

In the case of the People *v.* City of Chicago (321 Ill. 466-475) the Supreme Court of Illinois said:

> The public policy of a State is to be found embodied in its constitution, its statutes, and, when these are silent on the subject, in the decisions of its courts. The public policy of the State, when not fixed by the Constitution, is not unalterable but varies upon any given question with changing legislation thereon, and any action which, in the absence of legislation thereon, by the decisions of the courts has been held contrary to the public policy of the State, is no longer contrary to such public policy when such action is expressly authorized by legislative enactment.

Another Illinois case on this subject is Union Trust &

Savings Bank *v.* Telephone Co. (258 Ill. 202). The Supreme Court of Illinois said:

> While no statute has been enacted declaring such exclusive contracts criminal or giving a right of action to persons prejudiced by them, the courts have declared the public policy of the State, in accordance with the common law, to be opposed to such contracts which tend to put the power to render public service in the hands of one corporation and to take it away from all others. The legislature has the power to change this policy. It is a legislative question whether the public interest will be promoted by monopolistic rather than competitive service.

Chief Justice Marshall, in the case of McCulloch *v.* Maryland (4 Wheat. (U. S.) 315, 423), used the following language:

> Where the law is • • • calculated to affect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.

The Supreme Court has expressly upheld the jurisdiction of Congress to declare the public policy of the United States in the case of Michaelson *v.* United States (266 U. S. 42, 68). In that case, the following language was used:

> The words of the act are plain and in terms inclusive of all classes of employment; and we find nothing in them which requires a resort to judicial construction. The reasoning of the court below really does not present a question of statutory construction, but rather an argument justifying the supposititious exception on the ground of necessity or of policy—a matter addressed to the legislative and not the judicial authority.

DEFINE JURISDICTION OF COURTS SITTING IN EQUITY

The decisions and opinions of the Supreme Court of the United States in Bailey *v.* Alabama (219 U. S. 219) are significant in this connection. In that case the majority of the court held that a statute although in terms punishing a man for fraud in violating a contract to work, had the "inevitable effect" of convicting him of a crime in simply refusing to work and thus enforced peonage. This was held to be unconstitutional, in conflict with the thirteenth amendment, which was intended, as held in the majority opinion by Mr. Justice Hughes:

> • • • to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude.

The opinion further stated:

> There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based.

It is noteworthy in this case that the dissenting opinion by Mr. Justice Holmes proceeded on the ground that the contract in question (to render services in consideration of an advance payment) was in itself a legal one, and that therefore a man could be legally punished for obtaining money by making such a contract with a fraudulent intention of breaking it. He met the argument that the enforcement of such contracts would result in peonage by the pertinent comment: "If the contract is one that ought not to be made, prohibit it." Thus both opinions already support the right of Congress to declare contracts resulting practically in involuntary servitude to be contrary to public policy and to deny their enforceability or validity in the Federal courts.

The declaration of a public policy is not new to the Congress of the United States. Such a policy is explicitly declared in the present railway labor act, as previously

noted. In this connection, it is exceedingly interesting to trace the history of that act. Originally, in the transportation act, it was provided that disputes between employers and employees should, if possible, be "decided in conference between representatives designated and authorized so to confer." In administering this law the labor board found great difficulty on account of the interference by employers with the free designation of representatives by the employees. The chairman of the board appeared before the Interstate Commerce Committee of the Senate and explained the trouble. (See Hearings, Interstate Commerce Committee of the Senate on S. 2646, 68th Cong., 1st sess.) On account of this difficulty, the present railway labor act included this specific provision:

> Representatives, for the purposes of this act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other. (Par. 3, sec. 152, title 45, U. S. C. A., 1929 sup.)

This act definitely declared the same public policy in regard to railway employees as is declared in the proposed bill in regard to all employees, and this provision of the railway labor act has been sustained by the United States Supreme Court in Texas & New Orleans Railroad Co. *v.* Brotherhood of Railroad & Steamship Clerks, decided May 26, 1930, as previously cited.

Another instance in which Congress declared the public policy of the United States is found in section 15a of the interstate commerce act, passed as a part of the transportation act of 1920. The language referred to in that act is as follows:

> Inasmuch as it is impossible (without regulation

and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States. (41 Stat. 489.)

The declaration by Congress of the public policy thus declared was interpreted and sustained by the Supreme Court of the United States in the case of Dayton-Goose Creek Railway *v.* United States. (263 U. S. 456.) The opinion of the court in this case shows that the act was interpreted and sustained upon grounds of the public policy thus declared by Congress. The court in that case said:

> The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. * * * To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the commission.
>
> Title IV of the transportation act, embracing paragraphs 418 and 422, is carefully framed to achieve its expressly declared objects.

The public policy of the United States in regard to disputes between labor and employers of labor, having been declared as provided in the proposed bill, it will become the duty of the courts to carry out this policy and to uphold it in passing upon any litigated questions which may arise under the act. Such a declaration of public policy

should be of great assistance to the courts in the adjudication of any controversies which may arise.

The "Yellow Dog" Contract

One of the very serious difficulties which has arisen in many of the injunctions which have been issued in labor disputes has been the so-called yellow-dog contract. This contract is one which requires the employee, as a condition of obtaining employment, to agree that he will not join a union while he is in such employment, or, that if he is then a member of a union, he will disassociate himself from it; that he recognizes the right of the employer to discharge him without notice; that he will not quit without giving to his employer notice sufficient to enable the employer to hire some one to take his place. Such contracts frequently require the employee to agree in advance to accept such conditions of labor, hours of labor, etc., as may from time to time be decided upon by his employer. Not all of these contracts are the same, but, in general, the conditions are such as those which have been briefly outlined. In all of them the employee waives his right of free association and genuine representation in connection with his wages, the hours of labor, and other conditions of employment. In other words, he surrenders his actual liberty of contract and to a great extent he enters into involuntary servitude. Yet the Supreme Court has held very recently that "collective action would be mockery if representation were made futile by interference with freedom of choice." (Texas & New Orleans case previously cited.)

It is no defense to say that he is not compelled to sign a contract, as is so clearly pointed out in the citation from Chief Justice Taft heretofore quoted. He is helpless in dealing with his employer. This was not always true. It is only under modern conditions where, under the law, employers organize; where large corporations control labor

in an entire line of industry. He is dependent upon his daily wage and so is his family. Therefore, he must accept whatever wages and whatever conditions are laid down by the employer. He has no other course to pursue. Union on his part with his fellow workers is absolutely necessary to protect his own liberty and, if he signs away this right, to a great extent he becomes the slave of his master.

In sustaining the right of railway employees to organize the Supreme Court held:

> Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. (Texas & New Orleans case previously cited.)

This doctrine upholds the purpose of the proposed bill.

One of the objects of this legislation is to outlaw this "yellow dog" contract. It has become necessary for Congress to take some action in regard to these contracts, because many of the injunctions which have been issued by Federal courts have been based wholly or in part upon such contracts on the assumption that they are valid and not contrary to public policy.

At the first blush it would seem unnecessary to pass any legislation upon the subject, because it is difficult to see how any court could sustain such a contract even though there were no statute condemning it. Many of the most eminent jurists have always believed that such contracts were void for several reasons.

First. They are contrary to public policy. If these contracts are held to be legal in one type of litigation, it would follow that they must be held legal in all other controversies, and thus in order to sustain life and support families, laboring men may be compelled to enter into practical peonage. If men must agree in advance to surrender

any real liberty of contract in order to attain employment they are, under coercion of necessity, forced into working under conditions of involuntary servitude.

Second. These contracts should be held void because they are entered into without consideration. The employer on the one hand has his work which he wants done. The laborer on the other hand, as a consideration for his part of the contract, undertakes to perform, the labor. In practically every case there is no hiring for a definite period; no assurance of either work or fixed wages. The employer gives up none of his freedom of action and furnishes no consideration for the promise of the employee that he will surrender ordinary rights of "liberty of contract" which are inherent in every free citizen.

Third. Such contracts should be held void because they are signed by the employee under coercion. The employee is forced to accept all of these burdensome conditions in order to support himself and family, because no man will voluntarily deprive himself of his power of self-protection.

Nevertheless, since such contracts have been held by the courts to furnish a legal basis for preventing employees from organizing for self-help, it seems to be necessary that some legislative action should be taken to liberate workers from a servitude thus imposed. The bill declares that such contracts are:

> • • • contrary to the public policy of the United States, shall not be enforceable and shall not afford any basis for the granting of legal or equitable relief by any court of the United States.

Abuses of Injunctive Power

One of the indefensible things contained in a great many of the injunctions issued by Federal judges is the enjoining of any person, organization, or corporation from paying benefits to laborers who are engaged in carrying on a strike. As a rule, labor unions provide for a fund out of

which they pay benefits to their members who are out on a strike. These injunctions prohibit them from paying such benefits, although the accumulation of this fund has been in part contributed by the very men who are on a strike and under the rules of the union they are, as a matter of fact, entitled to these benefits.

Some of these injunctions go still further. They not only prohibit the unions from paying any strike benefits to men who are on a strike, but they prohibit any person, whether a member of the union or not, from in any way giving any assistance to the persons who are on the strike. It is a common thing, in the operation of coal mines, for the owners of the mine to own the houses in which the laborers live. They make a contract with the laborer for the rental which shall be paid, providing also for the surrender of the premises under conditions named in the contract of lease.

If a dispute arises between the employer and the employee as to whether the contract has been violated and as to whether the owner is entitled to dispossess the employee, the question becomes one of forcible entry and detainer under the laws of the State where the property is located. These laws usually, if not always, provide for the trial of forcible entry and detainer cases before an inferior court. Either side, being dissatisfied with the decision of the court, has the right to take an appeal. If the appeal is taken by the tenant he must put up a bond, not only to pay the costs, but to pay a reasonable rental for the property in case the decision in the higher court is against him. This is a right given him under the State law. The State law is general and applies to every one. It is the only means by which the question in dispute between landlord and tenant can be fully decided. If a tenant is wrongfully withholding the property the landlord is protected by the bond which the tenant must give providing for the payment of rental if the case shall ultimately be decided

against him. Yet, strange as it may seem, Federal judges have been in the habit of issuing injunctions restraining outsiders—usually the term used is "any person whomsoever"—from doing anything to assist the laborer in a forcible entry and detainer case pending in the State court.

All persons are enjoined from furnishing bonds to take those cases up on appeal. All persons are enjoined from paying any money in the way of expenses in connection with such litigation in the State courts. The injunctions often go far enough to prevent an attorney from giving any advice to the employee who is trying to hold possession of a house belonging to the employer. All persons are restrained from giving them any assistance while they are living in these houses, including food and fuel. Why the judges of the United States, by extending the extraordinary remedy of the injunction, should prohibit laboring men from litigating in State courts, under the law of the State, to sustain what they claim to be their rights, is almost beyond human comprehension. In truth, such a summary method of depriving persons of their "day in court" has never been held to be "due process of law" in any other class of cases.

The bill, under section 4, takes away from all Federal courts the power to issue such injunctions. It also, in the same section, prohibits the issuing of injunctions which restrain employees from—

> • • • assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute.

It prohibits Federal courts from issuing injunctions restraining anyone from inducing or advising without threat, fraud, or violence, any of these things regardless of whether the employee may have signed the so-called "yellow dog" contract.

Section 4 also prohibits the granting of injunctions

which would restrain strikers from giving publicity to the existence of or the facts involved in a labor dispute. One of the most recent injunctions in a labor dispute was issued in the District Court of the United States for the Northern District of Iowa. This injunction was issued on the 29th day of March, 1930, enjoining the defendants, among other things, from—

> • • • printing, publishing, issuing, circulating and distributing, or otherwise communicating, directly or indirectly, in writing or verbally to any person, association of persons, or corporation, any statement or notice of any kind or character whatsoever, stating or representing:
>
> (1) That there is a strike at the mill or plant of complainant at Fort Dodge, Iowa; or that the strike of 1921 is still in existence; or that there is a controversy over wages or conditions of employment between complainant and its employees; or any false statement with reference to conditions of employment at complainant's plant.
>
> (2) That complainant is unfair to organized union labor, or that its products are or were unfair to organized labor, or are on an unfair list.
>
> (3) That complainant forces or requires its employees to sign or subscribe to the so-called "yellow-dog" contract.

The defendants in this case; it will be observed, were not allowed to tell anyone that a strike was in progress. They were not allowed to give any publicity in any way to the fact that a strike existed. They were not allowed to tell anyone that the complainant required its employees to sign the "yellow dog" contract. In other words, their mouths were absolutely closed and "free speech" was forbidden. They could not, without violating this injunction, have sought advice from an attorney. The son would not be allowed to seek advice from his own father. And if the defendants violated this severe decree they would be liable for contempt of court, which means that they would

be tried for an offense made illegal by the judge—an offense consisting of an act which would be perfectly lawful under the laws of the State where the controversy existed. They were not only forbidden to violate this judge-made statute, but, in case they did violate it, they would be tried by the man who made the statute. They would not be allowed a trial before a jury of their peers—a privilege granted to the vilest of criminals.

It has long been recognized by students of law and government that the power to make law and the power to enforce law should be separated as a protection against tyranny. To prevent executive tyranny, the legislative power has been carefully separated from the executive power in our scheme of government and to prevent judicial tyranny it is equally necessary to preserve the separation of the legislative power from the judicial power.

A warning against the growing exercise of legislative power by the courts in injunction cases was uttered long ago by the great commentator, Blackstone, in the following language:

> In all tyrannical government, the supreme magistracy or the right of making and enforcing laws is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together there can be no public liberty. (1 Blackstone 142.)

It is amazing to realize that in the last 40 years there has developed in the American courts the practice of writing a special law to fit the individual case by judges in issuing labor injunctions; and that thereupon the judge, who himself wrote the law, has undertaken to prescribe the penalty for its violation and to punish the violator without permitting the accused to enjoy a trial by jury or even to insist upon a trial before another judge. It can not be successfully claimed that the courts have not

written into these injunction cases a new law of labor disputes, fitting the law to each particular case, and then enforcing this new law made by the court.

Pomeroy, perhaps the leading authority, describes the development of the law compactly in his Equity Jurisprudence in the following language:

> The courts have thus been required to face such questions as the nature and extent of the capitalist's rights in the management of his business and of the workingman's property in his labor; to decide how far the employer shall be protected in his right to have labor and custom flow to him free from the interference of third parties and how far the laborer shall be protected from similar interference in his contract of employment or his right to secure employment; to determine what limits shall be placed upon the individuals and combinations of individuals in seeking their economic advancement at the expense of their fellows. All these and other problems have come before the courts in rapid succession. (Pomeroy, Equity Jurisprudence (4th Ed.) vol. 5, p. 4566, sec. 2018.)

There can be no question, therefore, that there has been created, as a result of writing law into injunction orders and then enforcing those orders by the same judge who wrote them without a grant of trial by jury, that condition of uniting the two powers of making and enforcing laws in one person or one body of men wherein, using the language of Blackstone, "there can be no public liberty."

It is difficult to see how any civilized people could indefinitely submit to such tyrannical procedure. It is not difficult to understand how such cruel laws, made not by any legislature but by a judge upon the bench, should bring our Federal courts into disrepute. Neither is it difficult to see how such injunctions, violating the conscience of civilization, should frighten persons against whom such injunctions are issued into desperation. What

free American citizen is willing to submit to the violation of his sacred rights of human liberty and freedom?

Responsibility for Unlawful Acts

Section 6 of the bill relates to damages for unlawful acts arising out of labor disputes. It is provided that officers and members of any labor organization, and officers and members of any employers' organization, shall not be held liable for damages unless it is proven that the defendant either participated in or authorized such unlawful acts, or ratified such unlawful acts after actual knowledge thereof.

To hold that officers or members of a labor organization, or the organization itself, should be liable for damages for unlawful acts committed while a strike is on, without clear, actual proof of authorization, participation in, or ratification of such unlawful acts, would go far toward the destruction of organized labor.

Moreover, it will be observed that this section, as do most all of the other prohibitive sections of the bill, applies both to organizations of labor and organizations of capital. The same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees.

In most cases where strikes occur involving a great many employers and employees and covering a comparatively large territory, there are often unlawful acts committed in the way of injury to property or to persons. It is not the intention of the bill to protect anybody, whether he be employer or employee, from punishment for the commission of unlawful acts either as against property or persons. But no person or organization should be held thus liable unless he or it caused the unlawful act or participated in it or ratified it. It has often occurred that employers themselves have secured the services of detectives who, under the guise of labor men, have gained ad-

mission into labor unions. When this happens these detectives are usually doing everything within their power to incite employees who are on strike to commit acts of violence, and such detectives, contrary to the definite instructions of labor union leaders, sometimes commit unlawful acts for the express and only purpose of laying the foundation for injunctive process, of bringing discredit upon the union, and of making its officers and members liable for damages.

In case of a strike, where the officers of the labor union are doing everything within their power to prevent acts of violence from being committed by any person, the law should fully protect them and save them and the members of their organization who are following their advice from liability in damages because of unlawful acts of persons who are either directly or indirectly connected with those who are trying to defeat the purpose of the strike.

Opposition to this section has been voiced on the ground that it seeks to establish a "new law of agency." In the first place, this section is concerned especially with establishing a rule of evidence. There is no provision made relieving an individual from responsibility for his acts, but provision is made that a person shall not be held responsible for an "unlawful act" except upon "clear proof" of participation or authorization or ratification. Thus a rule of evidence, not a rule of substantive law, is established. "The general power of every legislature to prescribe the evidence which shall be received and the effect of that evidence in the courts of its own government," has been repeatedly upheld by the Supreme Court. (See Fong Yue Ting *v.* U. S., 149 U. S. 698, 749; Bailey *v.* Alabama, 219 U. S. 219, 238.)

But the argument is made that a man is held legally responsible for the acts of his agents taken in due course of employment. This argument is evidently based upon a

doctrine of the civil law of negligence. It has no application to the criminal law. If a man is held responsible for an unlawful act, his responsibility rests on the basis of actual or implied participation. He is responsible for conspiring to do an unlawful act or for setting in motion forces intended to result, or necessarily resulting, in an unlawful act.

> Strictly speaking, the legal relation of principal and agent does not exist in regard to the commission of criminal offenses. All who participate in the commission of such offense are either principals or accessories. (Anderson *v.* State, 22 Ohio State 305.)
>
> But where the agent's criminal act is unauthorized and is not sanctioned or acquiesced in by the principal, especially where it is contrary to the principal's direct instructions, the latter can not be held criminally responsible therefor. (Clark and Skyles, Law of Agency, Vol. I, p. 1140.)

The distinction should be clear. A man operating a dangerous machine negligently injures someone, and the negligence is imputed to the employer. But there is a distinction between the torts of an employee and the crimes of an employee, and criminal responsibility is not to be imputed. If the president of a corporation sends a bill collector to persuade a debtor to pay a bill, instructing him to collect it in a peaceable manner, he does not become responsible for an assault by his employee upon the debtor.

According to the same reasoning, why should an officer of a labor union, who has specifically advised members that violence must be avoided, become responsible for the hot-headed action of some member in perhaps assaulting a strike breaker? Again, the relationship between officers and members of labor unions and other members is not that of employer and employee. The officers chosen by a union are not employers of the membership. They have no control over their associates based upon the power of

determining whether or not they will employ them. It may be accepted that if a group associated in common activities becomes controlled by a lawless majority, it may be necessary for law-abiding men to dissolve their association with lawbreakers; but the doctrine that a few lawless men can change the character of an organization whose members and officers are very largely law-abiding is one which has been developed peculiarly as judge-made law in labor disputes, and it is high time that, by legislative action, the courts should be required to uphold the long established law that guilt is personal and that men can only be held responsible for the unlawful acts of associates because of participation in, authorization or ratification of such acts. As a rule of evidence, clear proof should be required, so that criminal guilt and criminal responsibility should not be imputed but proven beyond reasonable doubt in order to impose liability.

There has been a distinct conflict of opinion in the courts as to the degree of proof required. Mere ex parte affidavits establishing a certain amount of lawless conduct in the prosecution of a strike have been held in some instances to establish a "presumption" that the entire union and its officers were engaged in an unlawful conspiracy; and, on the other hand, other courts have declined thus to substitute inference for proof, rejecting such a doctrine in language such as the following used in a New York case: "Is it the law that a presumption of guilt attaches to a labor union association?" Various examples of these different rulings are quoted in The Labor Injunction, by Frankfurter and Greene, pp. 74-75.

It is appropriate and necessary to define by legislation the proper rule of evidence to be followed in this matter in Federal courts. That is the only object of section 6.

Procedure

The bill, in section 7, provides for the procedure which shall be followed in case application is made for a temporary restraining order or for a temporary or permanent injunction. It provides that no temporary or permanent injunction shall be issued except after hearing the testimony of witnesses, under oath, in open court. The court is also required, before it issues a temporary or permanent injunction, to permit the defendants to offer testimony in opposition to such injunctions; and, before the court is authorized to issue the temporary or permanent injunction, it must find that unlawful acts have been threatened or committed and will be executed or continued unless restrained; that substantial and irreparable injury to complainant's property will follow, and that as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief.

This procedure balances the effect of an order upon both parties, and while an injunction might be granted against certain unlawful acts the injury to complainant from such acts can not be made the basis of enjoining other acts from which complainant will suffer but little, but the prohibition of which may cause greater injury to the defendants. This is only statutory sanction of the best and long established practice in equity. (See Pomeroy, Equity Jurisprudence (4th ed.), sec. 1685.)

It is likewise provided in section 7, that in addition to the ordinary requirements applying to all applications for injunction, the court must find—

> That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection.

This is an entirely new provision, but it is believed to be a just one.

These injunctions are issued upon an allegation, among other things, that unless the order is issued complainant's property will be injured or destroyed. If the public officers whose duty it is to protect complainant's property are able and willing to give the protection required by law, there is no reason why the court of equity should take over the functions of the executive department and undertake to police their districts and no reason why the extraordinary and one-sided remedy of an injunction should be resorted to. It seems, therefore, but fair that before the injunction is issued, the court should find from the evidence that such officers have failed or are unable to furnish the protection required by law.

Injunctions are often applied for and issued for the moral effect that such injunctions will have in disheartening and discouraging employees engaged in a strike, rather than because of any real necessity to protect property.

Provision is also made in the bill for the issuance of a temporary restraining order without notice. This can be done only if the complainant shall alleged that such temporary restraining order is necessary and that if time is taken to give notice a substantial and irreparable injury to complainant's property will be unavoidable.

Before issuing such temporary restraining order, however, the court must take testimony under oath, and such testimony must be sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice.

Injunctions issued without notice to the defendants against whom the injunctive order is sought are always ex parte. No good reason exists why this evidence thus taken, without the presence of the defendant, should not be required to be sufficient, if sustained, to sustain an order issued after notice and hearing. If the complainant

can not make a prima facie case without notice, he certainly never would be able to make such a case after notice when the defendant was in court contesting the issuing of the injunction.

The bill provides that such temporary restraining order so issued without notice shall not be effective for a longer time than five days. This, however, is a reasonable requirement. The only object in issuing a temporary restraining order without notice is because it is alleged by the complainant that notice of such application would bring about destruction of his property. Therefore, the time that such an extraordinary process should be effective without notice should not be prolonged beyond the time that it would take to give notice, and it is difficult for any mind to conceive of a condition where notice could not be given and a hearing held within the 5-day limit.

It is provided in section 8 that no restraining order or injunctive relief shall be granted to any complainant who has not complied with any obligation imposed by law in regard to the settlement of any labor dispute. Neither shall such order issue unless the complainant has made every reasonable effort to settle such dispute, either by the aid of negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration. But where such negotiations are in progress and have not been completed, the court is not required, before issuing the writ, to await the outcome of such action if the court is satisfied that irreparable injury is threatened.

This section simply requires that a complainant shall not be entitled to injunctive relief who has failed to comply with any legal obligations which may exist, to be performed on his part. In other words, he must go into court with clean hands. This doctrine here announced is that persons have no right to seek the aid of Federal courts and impose upon them additional burdens who have not

sought to do all within their power to avoid the aid of the courts and who are not themselves aggravating or causing the dispute by violation of legal obligations.

It has often occurred, where employers have refused to confer with their employees, as required by law; or where they have refused to comply with the requirements of the law for the protection of employees, that they have nevertheless sought to have the court restrain the employees from promoting their interests properly in the resulting dispute. An employer who has himself brought on a controversy by wrongful conduct is not entitled to the aid of equity in advancing his interests in the resulting conflict.

> A court of equity acts only when and as conscience commands; and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses, and whatever use he may make of them in a court of law, he will be held remediless in a court of equity. (Deweese *v.* Reinhard, 165 U. S. 386, 390.)

Other cases and authorities upholding this principle written into the proposed bill are cited in the recent opinion of the Supreme Court of Wisconsin in Adler & Sons *v.* Maglio (228 N. W. 123), where the court denied injunctive relief and dismissed the complaint of an employer whose conduct was described by the court as follows:

> Plaintiff pursued a course of conduct that precipitated a labor war. When the tide of battle seemed to be setting against it, the plaintiff sought to withdraw from the field to which it had deliberately gone, and appealed to a court of equity for protection from the consequences that naturally flowed from the course of conduct which it had deliberately pursued.
>
> A court of conscience will not extend its strong arm to protect one who has pursued such a course of conduct. It will leave such applicant for relief where it had deliberately chosen to place itself. (P. 125.)

Later the court further upheld application of the equitable rule in the following language:

> Its strict application to all labor controversies ought to admonish both parties to these modern industrial struggles that, while they may conduct their own affairs in any way that does not violate the law, neither can be guilty of conduct that invades the rights of the other in regard to, or all events connected with, the matter of litigation, so as to in some measure affect the equitable relations subsisting between the two parties without forfeiting all right to resort to the extraordinary powers of equity. (P. 126.) (See also Cornellier *v.* Haverhill Shoe Manufacturers Association, 212 Mass. 554; Weegham *v.* Killefer, 215 Fed. 168; Pomeroy, Equity Jurisprudence (fourth ed.) sec. 398).

The bill also provides for a speedy appeal by any party to the case who may be dissatisfied with the action of the court, either in allowing or denying the injunction; and when a case is appealed to the circuit court of appeals, it becomes the duty of that court to consider the case with the greatest possible expedition and to give such cases precedence over all other matters except older matters of the same character.

Jury Trial in Contempt Cases

Section 11 of the bill provides that where a person is charged with indirect criminal contempt for violation of a restraining order or injunction, the defendant shall have the right to demand a speedy and public trial by a jury. This requirement does not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice. Neither does it apply to misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

Section 12 provides that the defendant in any proceed-

ing for contempt of court is authorized to file with the court a demand for the retirement of the judge sitting in the proceeding if the alleged contempt arose from an attack upon the character or the conduct of the judge and if the attack occurred otherwise than in open court. Upon the finding of such a demand another judge shall be designated to hear the contempt proceeding, as provided in Section 21 of the Judicial Code.

It will be observed that sections 11 and 12 have a general application and are not confined to labor disputes.

The ordinary criminal laws provide that any person charged with a crime shall have the right to a jury trial. The person tried for contempt of court is tried for a criminal act. It is true this act has not been made criminal by a statute, but by the order of a judge. The judgment, however, can deprive the defendant of his liberty, can confine him to jail, and the length of the term of confinement is within the discretion of the judge who made the order. The judge becomes the legislature and, as such legislature, he makes something a crime that is not a crime under the general law. He then sits in judgment and tries the person who is charged with violating the law which he has enacted. What difference is it to the defendant, so far as his punishment is concerned, whether the law has been made by the judge or by the legislature? His suffering is just as great in one case as in the other. Why should he be deprived of a jury trial when the law is made by one man instead of by the regular legislative authority? And in addition to all this, what defense can be made of the law which provides that the defendant shall have no opportunity, not only for an impartial jury, but for an impartial judge as well? And when the charge is made that the contempt arises from an attack upon the character or the conduct of the judge, what principle of justice would permit this same judge to sit in judgment upon

the accused? All sense of justice and all fair judicial procedure revolt at such a condition.

If an attack is made upon the character or the conduct of the judge by a writer in a newspaper, for instance, is it fair, is it compatible with our idea of jurisprudence, that the judge against whom the attack is made should preside at the trial of the offender? Suppose a judge were assaulted on the street by a common thug. Our procedure would not permit this judge to sit at the trial of the person charged with the assault and battery. He would be tried under the laws provided by the legislature. In an injunction case, the general laws of the legislature would not apply. The person assaulted would not only preside at the trial but he would fix the punishment without regard to statute but in accordance with his own idea as to what the punishment should be.

It is interesting to note that, severe as was ancient law, it was the prevailing practice in the English courts for centuries that trials for criminal contempt were tried by a jury. It is only in the American courts in the last century that such trials by the judge alone developed. And yet we live under a Constitution which provides that—

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. (Amendment 6.)

Also—

> The trial of all crimes, except in cases of impeachment, shall be by jury. (Art. III.)

The power of the Congress to require trial by jury in cases of indirect criminal contempt should not be now subject to serious question. Criminal contempt consists of disobedience of the orders of the court, obstructions to the administration of justice, which are punished as an offense against the court and differ from civil contempt in

that the purpose of punishment is not to grant relief to a litigant but to maintain the dignity of the court and uphold the power of Government. Direct criminal contempts consist of misbehavior in the presence of the court or so near thereto as to interfere directly with the administration of justice. Such contempts are expressly excepted from the provisions of trial by jury. Indirect criminal contempt consists of violation of the orders of the court, which is exactly the same as the violation of law, except that the law is written in the order of the court instead of in a statute.

The Supreme Court sustained the right of trial by jury required by congressional enactment in the Clayton Act in cases of indirect criminal contempt in the case of Michaelson *v.* United States (266 U. S. 42), where the unanimous opinion of the Supreme Court, written by Mr. Justice Sutherland, reads as follows:

> Contempts of the kind within the terms of the statute (criminal contempts described in the Clayton Act) partake of the nature of crimes in all essential particulars. "So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N. S., p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way." Gompers *v.* U. S. (233 U. S., 604, 610-611). • • • The statutory extension of this constitutional right (trial by jury) to a class of contempts which are properly described as "criminal offenses" does not, in our opinion, invade the powers of the courts as intended by the Constitution or violate that instrument in any other way (pp. 66-67).

Section 13 of the bill defines various terms used in the act, and it is not believed that any criticism has been or will be made to these definitions.

The main purpose of these definitions is to provide for

limiting the injunctive powers of the Federal courts only in the special type of cases, commonly called labor disputes, in which these powers have been notoriously extended beyond the mere exercise of civil authority and wherein the courts have been converted into policing agencies devoted in the guise of preserving peace, to the purpose of aiding employers to coerce employees into accepting terms and conditions of employment desired by employers.

The proposed bill is designed primarily as a practical means of remedying existing evils, and limitations are imposed upon the courts in that class of cases wherein these evils have grown up and become intolerable. This is a reasonable exercise of legislative power, and in order that the limitation may not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes, the bill undertakes specifically to designate those persons, who are entitled to invoke the protections of the procedure required.

The other sections of the bill contain the usual provisions in regard to the possibility of the court's holding portions of the act invalid and in relation to the repeal of acts in conflict with the provisions of the proposed legislation.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936.

No. 658.

PAUL SENN,

Appellant,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL NO. 5, CHARLES SCHREIBER et al.,

Respondents.

Appeal from the Supreme Court of the State of Wisconsin.

BRIEF OF RESPONDENTS.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936.

No. 658.

PAUL SENN,

Appellant,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL NO. 5, CHARLES SCHREIBER et al.,

Respondents.

Appeal from the Supreme Court of the State of Wisconsin.

BRIEF OF RESPONDENTS.

NATURE OF APPEAL.

This is an appeal from a judgment of the Supreme Court of the State of Wisconsin, handed down on June 29, 1936, affirming a judgment of the trial court, the Circuit Court of Milwaukee County, in favor of the respondents, denying the appellant a permanent injunction to enjoin the respondents from engaging in peaceful picketing and advertising growing out of a labor dispute.

STATUTES INVOLVED.

It is asserted by the appellant that this appeal draws into question the validity of the entire Wisconsin Labor Code, Sections 103.51, 103.63, Wisconsin Statutes 1935. We should like to call to the Court's attention that the only pertinent sections under review here are Section 103.53, entitled, "Lawful Conduct in Labor Disputes," and Section 103.62 (3), entitled "Definitions." Under 103.62 (3) the Court determined that the term "Labor Dispute" includes a dispute between an employer and members of a labor organization engaged in the same trade, craft or industry as such employer. The Court then having determined that the controversy out of which this litigation grew was a labor dispute under 103.62 (3), applied the provisions of 103.53, which defines lawful conduct in labor disputes, and further provides that no court shall have jurisdiction to issue any restraining order or temporary or permanent injunction which would prohibit any person or persons from doing any of the aforedefined legal acts in furtherance of such labor dispute. This appeal then does not involve the entire labor code. While in the state court an attack was made on certain other provisions of the code on the grounds that such provisions are in violation of the Wisconsin Constitution, that question was determined adversely to the appellant, and so is no longer subject to review in this court, no federal question being involved.

MATERIAL FACTS.

The appellant, Paul Senn, first learned the trade of tile setting in Miami, Florida, in 1930, during which year he worked approximately two weeks as a helper and eight

months as a tile setter (R. 48). In 1931 he came to Milwaukee and entered into the tile laying business under the name of Paul Senn & Co., an unincorporated firm, and started to solicit work as a plastering and tile setting contractor (R. 49). Previous to this time he had been a plastering contractor (R. 47, 48).

One of his first acts upon starting business in Milwaukee was to confer with Mr. Melville, president of the Tile Setters Union, Local 5, relative to co-operating with union regulations in the tile setting industry. At that time the union had no formal contracts with the various other employers and contractors in the city, but did have what might be considered "gentlemen's agreements" regarding the hiring of union labor and complying with union rules. The appellant agreed to co-operate (R. 85). Later, upon visiting one of the jobs on which Mr. Senn was employed, Mr. Melville discovered that he was not working under union rules, since he (Mr. Senn) was working as a nonunion helper with a union journeyman, and also employed another nonunion man, his brother, to help on the job. He was informed of the facts but did nothing to correct them (R. 39-41, 86, 88).

The labor history of appellant over the period of years, starting with 1931 and until 1935, when the dispute with respondents became acute, indicates that no attempt was ever made to conform with union rules and regulations, either in number of hours worked (R. 70), or Sunday employment (R. 71), or in payment of the union scale of wages (R. 71, 73-76). The record further indicates that he employed his brother and used him as a helper approximately 10 per cent of the time (R. 69; Old Record 141-142); that he entered into a partnership with William Neidner, a union journeyman, who gave up his membership in order to enter into the partnership (R. 70), and for

the past two and a half years he has employed Arnold Holly, a suspended union member, knowing of Holly's suspension and the reasons therefor (R. 70-71). The question of Holly's reinstatement into the union as a condition precedent to Senn entering into the contract is a basis of dispute in the record (R. 34-35, 54, 58).

During the entire period that the plaintiff was engaged in the tile contracting business a great deal of his time was devoted to working either as a helper or a tile setter, performing work within the scope of the journeyman's craft (R. 49, 50; Old Record 84, 86-89, 177). Most of the work he did was that of a tile setter. From May, 1934, to May, 1935, out of a total of 1,777 hours on jobs, he attributes 771 hours to himself, or 40 per cent (R. 51, 53).

After the original negotiations which took place when appellant entered into the contracting business the record shows that there were occasional conferences with union officials. Finally, in March, 1935, the proposed contract was submitted to Mr. Senn, who refused to sign it because of article 111; a series of conferences was to no avail (R. 37), and in December, 1935, the Tile Layers Protective Union, Local No. 5, started to picket his premises, which are his home and office, and to follow his truck from his garage to his jobs to ascertain where those jobs were, for the purpose of picketing (R. 40-41). The pickets varied in number from two to four, picketed only on working days, and used no violence (R. 63, 64). Senn decided on meeting this economic pressure by counter activities; he decided to go into the brokerage business and sell tile indiscriminately to any buyers and thereby "wreck" the industry (R. 41, 62, 72-73). In pursuance of this plan he sent letters to contractors and inserted a "blind ad" in the Milwaukee Journal (R. 72-73).

During the period of 1931 to 1935 the tile industry in

Milwaukee had been in a very poor condition (R. 76-77, 83, 86), and this condition had been further aggravated by unskilled persons and others starting to compete in the trade and going into the contracting business (R. 38, 87). Membership in the tile layers' union decreased from 112 in 1929 to 41 in 1935 (R. 90).

It was because of these conditions that the local union adopted the rule which was incorporated in the proposed contract as article 111 (R. 87, 90). In co-operation with the union at least seven tile contractors, constituting the greater majority of them, entered into the contract. In all of these firms recognized craftsmen, who would have been eligible to membership in the union if they were not employers, but who were partners in or owners of the contracting firms, abided by article 111 of the contract (R. 43, 87).

As to Mr. Senn's qualifications as a skilled craftsman in the tile-laying industry, there is no dispute about the fact that he has fulfilled none of the requirements of the union's by-laws. He has not served the required apprenticeship nor pursued the course of study required to entitle him to be recognized as a practical tile setter (R. 66-68). While there is testimony by himself and his employee that his work is satisfactory, the record also shows that the only building contractor who testified as to his skill admitted that he had never seen Senn do what is considered highly skilled or technical work (Old Record 196-197), and further testimony by veteran members of the union that one with Mr. Senn's limited training and experience could not be considered a practical mechanic (R. 95-96; R. 100-101). Senn was advised of this during the negotiations with the union and was told that under such circumstances the union could not allow its members to work for him if he

persisted in working with the tools of the trade (R. 34, 79, 84).

The defendant unions are allied with a larger International Union comprising a number of building trades crafts. All these crafts require services as an apprentice before a man may be considered a journeyman craftsman entitling him to do the work of a practical mechanic (Constitution, pages 68, 69, 70).

The Wisconsin Labor Code, Sections 103.51 to 103.63, Statutes of 1935, set out in the appendix, enumerates what is to be considered lawful conduct in labor disputes. Such lawful conduct is defined as including giving publicity and information regarding the existence of a labor dispute, ceasing to patronize or to employ any person or persons, and peaceful picketing and patrolling. The act defines labor disputes, and further provides that restraining orders shall be issued under certain circumstances and for limited periods, and that injunctions shall not be issued except after a hearing had and certain facts found to exist. The facts to be found are:

(a) That unlawful acts have been threatened or committed and will be executed or continued unless restrained;

(b) That substantial and irreparable injury to complainant's property will follow unless the relief requested is granted;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial thereof than will be inflicted upon defendants by the granting thereof;

(d) That the relief to be granted does not violate the provisions of Section 103.53;

(e) That complainant has no adequate remedy at law; and

(f) That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection.

After due trial the Court found that the facts in the instant case established that there existed a labor dispute; that the acts and conduct of respondent union were lawful and in furtherance of such lawful labor dispute, and that the appellant was not entitled to relief. The Court specifically found that the objects of the union in its dispute with the appellant were as follows (R. 28):

15. "That the tile industry for some years last past has been in a demoralized state because of a lack of building operations; that the defendants and their members have been in competition with nonunion tile setters and helpers in their effort to secure work as a means of livelihood; that for the purpose of enhancing the interests of the defendants and their members, the defendants and their members have found it necessary for the protection of their individual rights in the prosecution of their trade to require of all employers agreeing to conduct a union shop to agree: 'That no individual, members of a copartnership or corporation engaged in the tile-contracting business shall work with the tools or act as helper, but that the installation of all materials within the classification of tile work shall be done by journeymen members of the Tile Layers Protective Union.'

16. "That the plaintiff, by virtue of his status of an employer and contractor, is not entitled to membership in the defendant unions; that the Constitution and Rules of the defendant unions require among other things that a tile setter shall be a journeyman tile setter who shall have acquired his practical experience by virtue of an apprenticeship, and that such apprenticeship shall, among other things, consist of

service as an apprentice of not less than three years; that the plaintiff has not served an apprenticeship as a tile setter in accordance with the rules of the defendant unions."

From these facts it was concluded that in furtherance of such objects:

"1. That a labor dispute exists between the plaintiff and the defendants respecting the unionizing of plaintiff's business on the terms proposed by the defendants; that the plaintiff and defendants are parties to said dispute, and that such dispute is within the definition of a labor dispute as defined in the Labor Code, Sections 268.18 to 268.29 (now Section 103.51-103.63), and subsections thereof, of the Wisconsin Statutes.

"2. That it is not unlawful for the defendants, in furtherance of said dispute, to advise, notify or persuade, without fraud, violence or threat thereof, any person or persons, of the existence of said labor dispute; that it is not unlawful for the defendants to give publicity to, and obtain or communicate information regarding the existence of fact involved in such dispute whether by advertising, speaking, or patrolling any public street or any place where any person or persons may lawfully be, providing said acts are done without intimidation or coercion and without fraud, violence, breach of the peace or threat thereof.

"3. That the defendants have not indulged in violence or fraud; that because of their statement made by their counsel in open court and in their presence, that they will not send any more letters to owners, contractors or architects as hereinbefore referred to, and will not indulge in any of the acts or conduct referred to in said letters, the Court concludes that no unlawful acts will be committed or will be executed or continued.

"4. That the agreement submitted by the defendants to the plaintiff, setting forth terms and conditions prevailing in that portion of the industry which is unionized, is sought by the defendants for the purpose of promoting their welfare and enhancing their own interests in their trade and craft as workers in the industry.

"5. That Article III of said agreement is a reasonable and lawful rule adopted by the defendants out of the necessities of the employment within the industry and for the protection of themselves as workers and craftsmen in the industry.

"6. That the plaintiff is not entitled to the relief prayed for in his complaint.

"7. That the above-entitled action be dismissed on its merits without costs."

From such findings an appeal was taken based upon whether (1) the term "labor dispute" was applicable to a situation where the dispute was between members of a union engaged in the same craft or industry and an employer engaged in such trade, craft or industry, and (2) if such dispute existed, were the demands made upon the employer reasonable ones? It was contended by appellant that to find a dispute existed, and that the demands made were reasonable, and upon such findings to deny appellant a remedy by way of injunction is to deny the appellant the equal protection of the laws, and to deprive him of his property without due process of law. The Wisconsin Supreme Court affirmed the findings of the trial court, and from this decision this appeal was taken.

ERRORS ASSIGNED BY APPELLANT.

The seven assignments of error appearing on pages 6, 7 and 8 of brief of appellant may be summarized as follows:

(1) That Sections 103.51 to 103.63 of the Wisconsin Statutes of 1935 (which will hereafter be referred to as the Wisconsin Labor Code), as construed by the Supreme Court of the State of Wisconsin, deprive appellant of property without due process of law;

(2) That the Wisconsin Labor Code, as construed by the Supreme Court of the State of Wisconsin, denies appellant equal protection of the laws;

(3) That because appellant's employees were not members of the defendant unions, therefore to deny appellant relief from picketing was to deprive him of liberty and property without due process of law and to deny him the equal protection of the law.

The foregoing contentions are based on the Fourteenth Amendment to the Federal Constitution.

PRELIMINARY STATEMENT.

LAWS SIMILAR TO THE FEDERAL ACT KNOWN AS THE NORRIS-La GUARDIA ACT, AND THE WISCONSIN LABOR CODE, WHICH IS PATTERNED AFTER IT, HAVE BEEN ENACTED BY OTHER STATES SINCE THE PASSAGE OF THE FEDERAL ACT. THE QUESTION ON CONSTITUTIONALITY HAS BEEN BROUGHT TO THE ATTENTION OF FEDERAL AND STATE COURTS. UNDER VARIOUS FACTS IT HAS BEEN HELD THAT THE ACTS DID NOT DEPRIVE THE AGGRIEVED PERSONS OF PROPERTY WITHOUT DUE PROCESS OF LAW, AND THAT SUCH ACTS DID NOT DENY TO THE AGGRIEVED PERSONS THE EQUAL PROTECTION OF THE LAWS; THAT SUCH ACTS, WHEN CONSTRUED AS TO INCLUDE WITHIN THE DEFINITIONS OF A LABOR DISPUTE ORGANIZATIONS OF EMPLOYEES AND AN EMPLOYER WHOSE EMPLOYEES WERE NOT MEMBERS OF THE ORGANIZATION OF EMPLOYEES, AND WHEN THE CONTROVERSY WAS OVER UNIONIZATION, DID NOT DEPRIVE THE AGGRIEVED PERSONS OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW OR DENY TO SUCH PERSONS THE EQUAL PROTECTION OF THE LAWS.

It would afford an interesting subject for discussion, and a pertinent one, if a complete analysis were made of the historical antecedents of the present legislation. We refrain from doing so because of the many pages it would consume and because it is quite extensively referred to in the Congressional Committee Reports. For the con-

venience of the Court we have prepared, and submit herewith, a separate "appendix" including these reports.

We do, however, wish to direct the Court's attention that since the enactment of the federal act in 1932 (29 U. S. C. A., pars. 101-115, referred to in this brief as the Norris-La Guardia Act), the Legislatures of seventeen states have enacted similar or identical legislation with respect to state courts. Wisconsin was the only state to have enacted its law prior to the enactment of the federal act, although it is drafted on the basis of the federal act which was then pending before Congress. To date the following states, some of them with slight modifications, most of them in substantially identical language, have enacted, with respect to their own courts, legislation of the nature of the Norris-La Guardia Act: **Oregon** (Ch. 355, Oregon Laws 1933), **Colorado** (Laws of 1933, Ch. 59), **Idaho** (Laws of 1933, Ch. 251), **Washington** (Extra Session Laws of 1933, Ch. 7), **Indiana** (Laws of 1933, Ch. 12), **Louisiana** (Act No. 203, Louisiana Regular Session 1934), **Maryland** (Laws of 1935, Ch. 574), **Massachusetts** (Laws of 1935, Ch. 407), **Minnesota** (Minnesota Laws, Ch. 23, Secs. 4260-1 to 4260-15, inclusive), **New York** (Laws of 1935, Ch. 477), **North Dakota** (Laws of 1935, Ch. 247), **Pennsylvania** (Act No. 311, Laws of 1931—modified by including "yellow dog" contract provision, Act No. 219, Laws of 1933), **Wisconsin** (Wisconsin Statutes 1933, Secs. 268.23 to 268.30, inclusive, now numbered 103.51 to 103.63), **Wyoming** (Laws of 1933, Ch. 37), **California** (Act 4104, Deering's Laws of 1933), **Utah** (Revised Statutes 1933, Secs. 49-2-6 to 49-2-7, inclusive), **Illinois** (Smith-Hurd Revised Statutes 1933, Ch. 48, Sec. 2-a).

It is interesting to note that in the short space of time since the enactment of the foregoing statutes by the various states enumerated, contentions respecting constitu-

tionality, in some cases identical with those made by appellant in this case, were made before federal courts and before courts of the states enumerated, and with the exception of one state, Washington (a decision based on its own Constitution), the enactments have been held constitutional.

Levering & Garrigues v. Morrin, 71 Fed. (2d) 284 (certiorari denied by the United States Supreme Court, 239 U. S. 594, 79 L. Ed. 687);

Dehan v. Hotel & Restaurant Employees (La. App.), 159 So. 637;

Aberdeen Restaurant Corpn. v. Gottfried, 285 N. Y. S. 832;

Wisconsin State Federation of Labor v. Simplex Shoe Mfg. Co., 215 Wis. 623, 256 N. W. 56 (Code construed although question of constitutionality not raised);

Fenske Bros. v. Upholsterers' Union (Ill.), 193 N. E. 112;

Cinderella Theatre Co. v. Sign Writers' Local Union, 6 Fed. Supp. 164;

Stanley v. Peabody Coal Co., 5 Fed. Supp. 612;

Knapp-Monarch Co. v. Anderson, 7 Fed. Supp. 332;

United Electric Coal Co. v. Rice, 9 Fed. Supp. 635;

U. S. v. Weirton Steel Co., Inc., 7 Fed. Supp. 255;

Miller Parlor Furniture Co., Inc., v. Furniture Workers Union, 8 Fed. Supp. 209;

Starr v. Laundry & Dry Cleaning Workers Union, 63 Pac. (2) 1104 (Oregon 1936);

George B. Wallace et al. v. National Association of Mechanics et al. (decided at same time as Starr case, supra);

American Furniture Co. v. I. B. of T. C. & H. of A. et al. (Wis.), 268 N. W. 250.

There are other pertinent cases bearing on the consti-

tutionality of the foregoing laws, but which were decided prior to their enactment:

Greenfield v. Central Labor Council, 104 Ore. 236;
Blumauer v. Local Union No. 159, 141 Ore. 399;
American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184;
Kronowitz v. Schlansky, 282 N. Y. 564;
Holden v. Hardy, 169 U. S. 366;
Knoxville etc. Co. v. Harbison, 183 U. S. 13;
Patterson v. Bark Eudora, 190 U. S. 169;
McLean v. Arkansas, 211 U. S. 539;
Bunting v. Oregon, 243 U. S. 246;
Texas & N. O. R. Co. v. Brotherhood of Railway Clerks, 281 U. S. 548.

ARGUMENT.

Appellant bases the errors alleged on the holding of the Wisconsin Supreme Court that the inclusion of article III in the proposed agreement and the request that the appellant comply therewith was a reasonable and just one, and directed to the legitimate objects for which workingmen may organize; and that the controversy arising out of such request constitutes a legitimate labor dispute, and that the activities permitted by Section 103.53 of the Wisconsin Statutes (1935) in furtherance of such dispute are lawful.

In the accompanying brief, written on the subject of jurisdiction only, we have endeavored to point out that the reasonableness and purpose of article III of the proposed agreement involved an issue of fact, and that the finding of the trial court, approved by the Supreme Court of the State of Wisconsin, is conclusive upon this Court. But since the attack upon constitutionality of the Wisconsin Labor Code is made on the construction of the Act as applicable to the factual situation in the case at bar, we shall proceed to discuss the reasonableness of article III of the proposed agreement and the request for compliance therewith by appellant.

I.

THE CONTROVERSY IN THE CASE AT BAR IS A LABOR DISPUTE OVER UNIONIZATION. THE TYPE OF CONTRACT OFFERED AND THE UNION RULES ARE DIRECTED TOWARD THE LEGITIMATE PURPOSES FOR WHICH WORKINGMEN ARE ALLOWED TO ORGANIZE. SINCE THE ACTS IN FURTHERANCE OF THE DISPUTE ARE PEACEFUL, THE REFUSAL OF THE TRIAL COURT TO ISSUE AN INJUNCTION WAS PROPER.

A.

The Controversy in the Case at Bar Is a Labor Dispute Over Unionization Upon Terms and Conditions Prescribed by the Union Regulating Wages, Hours, and Requiring Compliance With the Provisions of the Proposed Contract That Contractors Shall Abstain From Personally Working With the Tools of the Trade. The Inclusion of Such Provision by the Union Is in Furtherance of the Legitimate Interests of Its Members and Arises Out of the Necessities Required for the Protection of Their Individual Rights in the Prosecution of Their Trade.

The findings in this case are to the effect that the respondent labor unions are engaged in unionizing their trade or business for the protection of their wages, hours and working conditions. In furtherance of unionization the respondents found it necessary, because of the peculiar composition of their craft, which consists of employers with small numbers of employees, to require that employers who wish to be unionized abstain from working with

the tools of the trade. This rule has been in force for some years and all union employers within the craft are unionized on that basis. The respondents offered to unionize the apppellant on the same basis, but he has refused. **The respondents do not deny, as will be hereafter pointed out in greater detail, that it is the right and privilege of appellant to refuse to operate a union shop, nor do they deny that it is his right and privilege to refuse to sign the agreement with article III in it.** Their concession in this regard is the same as they concede that it is appellant's right to refuse to pay the wages set forth in the agreement or to conform to the hours provided therein. Respondents contend, however, that, because of appellant's refusal, it is their right to classify him as a nonunion contractor and to advertise that fact to the public by acts and conduct which are declared to be lawful under the laws of the state and Wisconsin Labor Code. In respect to the legality of the efforts of a labor union "to unionize an entire trade or business" and picket the premises of an employer with the intent of inducing him to unionize his place of business, the Court of Appeals of the State of New York, in the case of **Exchange Bakery & Restaurant v. Rifkin**, 245 N. Y. 260, holds:

> "The purpose of a labor union to improve the conditions under which its members do their work, to increase their wages, to assist them in other ways, may justify what would otherwise be a wrong. **So would an effort to increase its numbers and to unionize an entire trade or business.** It may be as interested in the wages of those not members, or in the conditions under which they work, as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages. All, by the principle of collective bargaining. Economic organization today is not based on the

single shop. Unions believe that wages may be increased, collective bargaining maintained, only if union conditions prevail, not in some single factory, but generally. That they may prevail, it may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor. And it may adopt either method separately. **Picketing without a strike is no more unlawful than a strike without picketing**. Both are based upon a lawful purpose. Resulting injury is incidental and must be endured." (Emphasis ours.)

On the principles thus enunciated by the New York Court of Appeals the Norris-LaGuardia Act was framed. See "**The Labor Injunction**," Frankfurter and Greene (Macmillan Company, 1930), pages 215, 216:

> "A word may be appropriate concerning the rationale of the general scheme thus proposed, before reviewing the specific activities that, by section 4, are excepted from the reach of an injunction. It is an attempt to recognize frankly that the central problem of the law of industrial relations is to determine the purposes that justify combination of laborers by marking the outposts of the concept of 'self interest.' How far laborers may combine to strike for concessions that are not of immediate benefit to them but which strengthen the union organization; **how far a union in one craft may use its power to achieve the unionization of nonunion plants within the same craft**; how far a union of one craft may exert its power in aid of unions of another craft, and how dependent one craft must be upon the other to justify co-operative tactics—these and like issues are the crucial ones. Section 9 of the proposed bill settles all of these questions so far as application for equitable relief is concerned. Immunity from injunctions extends to all the categories that we have

described, save alone as to persons who are not engaged in the same industry with the complainant. What occupation, craft or trade is within, or outside of, a particular industry is necessarily left for individual decision. The obvious change intended by section 9 is to extend the area of unrestrainable conduct beyond the limits now recognized by federal decisions. The interpretation given to the Clayton Act by the **Duplex Case**, to the effect that the privileges of that Act may be invoked only in a dispute between an employer and **his** employees, is thus rendered innocuous. So much for the meaning of the new proposals." (Emphasis ours.)

In the book "The Labor Injunction," aforereferred to, is appended a copy of the proposed Norris-LaGuardia Act, and the foregoing relates to a discussion of the definitions of labor disputes similar to the language contained in 103.62 and subsections of the Wisconsin statutes. The Norris-LaGuardia Act and the Wisconsin Labor Code were premised on the same legal principles as those expressed in the decision of **Exchange Bakery & Restaurant v. Rifkin**, supra.

(1) *Appellant confuses the issue by failing to recognize that the respondents have rights, and may maintain them, though they conflict with the rights of the appellant.*

Appellant confuses the issue by assuming that respondents are depriving appellant of his right to the "free use of his hands." They are doing no such thing; they are informing the public that he is a nonunion contractor and they appeal to the public not to patronize him. It is their right to make such appeal as much as it is his to work with his hands.

Neither do the respondents question the right of the

appellant to work at his own business with the tools of the trade as a nonunion employer. We have previously asserted that that is his right. The confusion arises from the appellant's incorrect approach. Appellant's case is based on the proposition that we are asserting appellant has no right to work with the tools of the trade. He has that right, but because he has that right we are not deprived of our right to demand that he operate as a union contractor and not work with the tools of the trade. His refusal brings the appellant and the respondents into conflict, which conflict is a labor dispute. Let us see if we can make ourselves clearer. The appellant has the absolute right to refuse to unionize his plant on the demand that he pay the wage scale set forth in the agreement submitted to him, but the unions have the absolute right to demand that he unionize on the basis that he pay that wage scale. His refusal creates a labor dispute. The appellant has the absolute right to refuse to unionize his plant on the basis of working his employees the hours prescribed in the agreement submitted to him, but the union has the absolute right to request that he unionize on the basis of those hours. This refusal creates a labor dispute.

If the fact that appellant has the right to do a certain thing renders illegal the demand that he do otherwise, then the respondents cannot have a labor dispute respecting any demand which the appellant has a right to refuse. But this is not the law. We believe that if the appellant fully appreciated the principle involved in the foregoing, that is, conflict of rights and the right of each to maintain their position and the right of each to engage in lawful economic persuasion to induce the other to yield, the fallaciousness of appellant's argument would at once become apparent. This rule is clearly announced in the

case of **New Jersey Painting Company v. Local 26**, 96 N. J. Eq. 632, 126 Atl. 399, 47 A. L. R. 384:

> "Economically the conclusion reached by the lower court **confuses the possible or probable effect of the defendant's action upon the employers with the defendant's rights.**"

It is the position, which the respondents here take and is a reiteration of respondents' claim that they are not denying to the appellant any rights which he asserts under the Constitution or the law of the land. The respondents are asserting their own rights, secured to them by common law and the Wisconsin Labor Code, and in the assertion of those rights are using all of the legal means at their disposal.

(2) *Many cases establish the rule to be as contended for by respondents, i. e., if the requests are related to the legitimate interests of the union, they are legal. Such interest is the securing of work for themselves in competition with others, and they may exert lawful economic pressure to displace nonunion men with union men.*

Respondents maintain that a proper determination of the question depends upon the determination of whether the respondent unions here have acted **maliciously** and **not in the proper protection of their legitimate interests,** or whether the demands made by the unions in the contract submitted to the appellant **have a proper and direct relationship to its legitimate interests.**

We refer the Court to the case of **Kansas v. Dorchy**, in 71 L. Ed. 248, wherein will be found an elaborate note indicating that the following are proper and legitimate demands, and citations are given in support thereof. Le-

gitimate demands are: Payment of wages during working hours; rates of wages payable by outside contractor; advancement or maintenance of wages; hours of labor; settlement of working conditions; amount of work required; piecework system; enforcement of contract rights; arbitration; mode of enforcing agreements; enforcing negotiations; right to do certain work; retention of obnoxious employee; number of apprentices; amount of help to be employed; reinstatement of employee; closed shop; collective bargaining. Of course, these are not all.

The rationale of these decisions is not a difficult one. The difficulty has always been in the application of the settled law to the facts in the particular case at hand.

The rule has been variously stated, not only in the negative, as was done in the case of **Roraback v. Motion Picture Machine Operators Union**, 140 Minn. 481, 168 N. W. 766, cited in appellant's brief, pages 30, 31, referring to the actions of any individuals or groups, but in the affirmative, as evidenced by the leading case of **National Protective Assn. v. Cummings**, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135. The case arose out of demands made by the union employees for the discharge of nonunion workers. The Court refused an injunction sought by one of the nonunion workers to restrain the union. Justice Gray, in a special concurring opinion, states the rule as follows:

> "Our laws recognize the absolute freedom of the individual to work for whom he chooses, with whom he chooses, and to make any contract upon the subject he chooses. There is the same freedom to organize in an association with others of his craft, to further their common interests as workingmen, with respect to their wages, to their hours of labor, or to matters affecting their health and safety. They are free to secure the furtherance of their common interest in every way

which is not within the prohibition of some statute, or does not involve the commission of illegal acts. The struggle on the part of individuals to prefer themselves and to prevent the work which they are fitted to do from being given to others may be keen and may have unhappy results in individual cases, but the law is not concerned with such results when not caused by illegal means or acts."

In 16 R. C. L. 410, at 448, the rule is stated:

"Decisions are practically in harmony in holding that it is within the power of labor unions and it is lawful for them to instruct or order their members not to accept employment with an individual, or to continue in such person's employment where the action of a union is **justifiable in the sense that it is to promote the welfare of the members of the union.** • • • They are left free to enter the employment of the prescribed employer although practically they are compelled to choose between the benefits of such employment and memberships in the unions."

There is cited in the foregoing, **Rhode Bros. v. Musicians Protective Union, Local No. 198**, 37 R. I. 281, 92 Atl. 641, L. R. A. 1915 E 1037 and note, which is a particularly strong case on its facts; since there the employer, having breached a contract with one group of union members, was, by a rigid enforcement of union by-laws, unable to engage any other union musicians even though he so desired, and his inability to do so caused him great damage.

In the case of **Pickett v. Walsh**, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.), one of great prominence in the annals of labor law, dealing with the legality of a strike called by union workers who refused to work where the

pointing of bricks and stones was given to others outside the union, the Court analyzes the problem in this way: That it is not a case where the union is imposing a penalty for failure to employ union members, but a case of where the union members refuse to work if he doesn't, which is perfectly legal. That the employer, as a practical matter, will be forced not to do that which he desires to do "is not decisive of the legality of the labor union's acts. That is true wherever a strike is successful • • •. **But the fact that the business of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the legality of them.**"

See also **Nat'l Fireproofing Co. v. Mason Builders Assoc.**, 26 L. R. A. (N. S.) 148, 169 Fed. 259; **Jettson-Wehle Lumber Co. v. Mather**, 53 Fla. 909, 43 So. 591; **Scott-Stafford Opera House Co. v. Minn. Music Assoc.**, 118 Minn. 411, 136 N. W. 1092; **Gray v. Bldg. Trades Council**, 91 Minn. 171, 97 N. W. 663; **Erdman v. Mitchell**, 207 Pa. 79, 63 L. R. A. 534, 56 Atl. 321; **Curan v. Treleavan**, 2 Q. B. 560; **Longshore Printing Co. v. Howell**, 38 Pac. 547, 28 L. R. A. 464.

And as to the validity of by-laws which are directed toward the advancement of the conditions of organized labor, see **Wabash Ry. Co. v. Hanahan**, 121 Fed. 163; **Purvis v. Local No. 500**, 214 Pa. 348, 12 L. R. A. (N. S.) 642, 63 Atl. 585; **Rhode Bros. v. Musicians Protective Union, Local No. 198**, 37 R. I. 281, 92 Atl. 641, L. R. A. 1915 E 1037 and note; **Local Union 313 v. Stothalis**, 135 Ark. 86, 205 S. W. 450, 6 A. L. R. 894; **Cohen & Roth Elec. Co. v. Bricklayers Union**, 92 Conn. 161, 101 Atl. 659, 6 A. L. R. 887.

In the case of **Cohen & Roth Elec. Co. v. Bricklayers Union**, supra, the Court, in dealing with an attempted attack on the validity of union by-laws which forbade members from working with nonunion men, said:

"The end the defendants had in view by their by-laws was the strengthening of their unions. That was the legitimate end. There is no indication that the real purpose of the defendant was injury to the plaintiff or the nonunion men it employed. Whatever injury was done plaintiff was a consequence of trade competition, and an incident to a course of conduct by the defendants begun and prosecuted for their own legitimate interests. The means adopted were lawful. No unlawful compulsion in act and word was present. The plaintiff had its option to employ the defendants or not; trade conditions did not convert this legal option into practical compulsion."

It is for this Court, then, to determine whether the demands made by the union in attempting to unionize appellant's business were made without malice and for the purpose of protecting their own legitimate interests.

The trial court found that the demands made by the unions in their attempt to unionize appellant's business were made without malice, were reasonable and for the purpose of protecting their own legitimate interests (Findings of Fact, 14, 15; Conclusions of Law, 4, 5; R. 110, 111).

We are therefore confronted with the question: Are the rules of the union as embodied in Article III of the proposed contract, and Article XX, Section 6 of the Constitution, rules that are reasonably directed to the legitimate pursuits of the union? (We reserve the argument as to the rule in Article XX, Section 6, for a later portion of this brief.)

The cases heretofore cited, and those cited in the case of **Kansas v. Dorchy**, supra, show that any rules which bear a proximate relationship to the wage scale, the hours of employment, and the encouragement of the exclusive em-

ployment of qualified union members, are for the furtherance of the lawful purposes of the union.

In **Overseas Storage Co. v. Chlopsek**, 209 App. Div. 834, 204 N. Y. Supp. 145, the Court says that

> "• • • the ultimate fact to be determined upon the trial of the case is whether the **primary purpose of the acts complained of is to better the** condition of the **boycotters** as laborers, in which case the boycott would be lawful—or to do irreparable injury to the employer in the conduct of his business, in which case it would not be lawful." (Emphasis ours.)

In **Zoat v. Building Trades Council**, 172 Wash. 445, 20 Pac. (2) 589 (1933), the Court held it lawful for a union to publicize the fact that, as in the case at bar, an employer worked himself in violation of a union rule.

The testimony in the present case, along with the Constitution and preamble to the Constitution, indicate clearly the motives of respondent union in demanding that the appellant here abide by Article III of the proposed contract if he wished to be recognized as operating a union shop. That there was no malice or ulterior motive directed against appellant is evidenced by the fact that approximately seven other contractors signed the same agreement prior to the demand on the appellant, and that in at least six of these union firms there are proprietors or copartners who are skilled journeymen, recognized as such by the union, who abide by the provisions of Article III of the standard union contract.

That the tile laying industry generally in Milwaukee has been depressed, and many union members had to resort to other occupations to earn a livelihood, and many were on relief, is admitted by the appellant (R. 76-77). The testimony of union officials is clear on the following points:

That from 1929, at which time there were approximately 112 union members, the membership has decreased to forty-one in 1936; that union members have been attempting to go into the contracting business; noncraftsmen, of whom the appellant is one, have gone into the contracting business, working at the craft, displacing union men; that as a result it is difficult for the union to maintain its scale of wages and hours for which it has always made a sustained effort for the benefit of its members; that Article III of the contract submitted to appellant, and to other contractors, was a part of this effort to maintain the standard of wages and hours, not only for journeymen, but also for helpers.

Appellant's own testimony, and that of the men associated with him, shows that work was done more than the eight hours a day which the union found necessary for the benefit of its workers; that he performed journeymen's work, although never having served an apprenticeship; that he worked on Sundays also; that he paid a lower wage to those working for him than the union scale provides.

The effect of the contractor working with the tools of the trade when and how he pleases is apparent insofar as the members of the respondent unions are concerned. That there is a direct immediate effect cannot be denied, considering the scarcity of work and the small number of men enrolled in the union.

(3) *There is a broader economic aspect involved in the controversy. A contractor working with the tools of the trade may underbid those who do not do so, and so affect respondents to their detriment.*

There is, however, the broader question, that is, the effect the appellant's method of doing business has upon

the industry. The contractor working with the tools of the trade is not subject to union discipline as he is not eligible for membership in the union. This is a universal rule in the building trades unions, that is, recognition of the distinction between employer and employee. The employer, therefore, working Sundays, all hours he pleases, and figuring his own personal labor at a much lower scale than that paid to the union, is able to underbid the union contractors for whom the respondent employees work. This inevitably leads to the union employer reducing wages, etc., to meet the competition of the employer working with the tools of the trade. Thus the effect of appellant's method of doing business reflects itself to the disadvantage of the respondents. This has been recognized by the United States Supreme Court in **American Steel Foundries v. Tri-City C. T. Council**, 257 U. S. 184, by Chief Justice Taft in the following language:

> "• • • in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood."

And, as is stated by Justice Andrews in **Exchange Bakery & Rest. Co. v. Rifkin**, 157 N. E. 130 (N. Y.):

> "It (union) may be as interested in the wages of those not members, or in the conditions under which they work, as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages."

That the provisions of Article III of the contract which prevents the contractor from thus depriving employees of a means of earning their livelihood, is directed primarily for the benefit of the union and not for the purpose of injuring the employer is obvious. That the assertion of

rights by respondents may cause injury to the appellant in his business is admitted. That is, in most cases, the inevitable and unfortunate result of competition in business and among workers themselves. **Martell v. White,** 185 Mass. 255, 69 N. E. 1085, 1087.

In **New Jersey Painting Co. v. Local 26,** 96 N. J. Eq. 632, 126 Atl. 399, 47 A. L. R. 384, the appellate court, in vacating an injunction granted by the lower court based upon what the lower court maintained was an arbitrary clause in the union constitution requiring contractors going into a different city to pay the highest of the two prevailing wage rates, held that the rule adopted and promulgated by the unions was not aimed at and did not apply to the plaintiff solely; it does not seek to establish arbitrary discrimination between one person or corporation and another.

> "The attack is aimed not at the combination but at its effect upon the employers. This is unsound, both legally and economically. In the last analysis, the prime object of the rule attacked is to establish a standard of wages. • • •
>
> "Economically the conclusion reached by the lower court **confuses the possible or probable effect of the defendant's action upon the employers with the defendant's rights.** The law gives to the defendants a right to sell their labor to whom they please, when and under such conditions as they may fix, individually, or in combination. They may make rules and regulations passed in good faith, providing for what they deem to be an economic advantage to themselves. If in the enforcement of such rules and regulations they violate no law, but act solely for the declared purpose, the courts ought not and cannot legally enjoin them from such concerted action simply because such action may affect some employers. • • •

"• • • The cases in which concerted action on the part of a body of workers have been held unlawful have invariably been such in which either the object sought to be attained had little or no bearing on the interest of the workers or in which the methods employed by them were in themselves unlawful." (Emphasis ours.)

(4) *Unions frequently adopt rules in the interest of employers.*

The adoption of rules for the proper regulation of workers in industry is one of the chief functions of the labor unions and union employers. The rule which gives rise to the issue in this case is that an employer shall not compete with his journeymen employees. It is devised for the protection of employees and it is quite universal in the building trades in that portion of the industry which is unionized.

Let us point out another quite common union rule prevalent in the building trades enforced by the union for the protection of the **employer.** The rule is based on the same principle, only it is devised so that the employees shall not compete with union contractors. There is a prevalent rule in the building trades industry that union employees, even though out of work, cannot accept employment with any one not a union contractor, even though the person seeking to employ them is willing to pay the union scale of wages, have them work the union scale of hours, and in all other respects observe union conditions. For instance, if one had a tile-laying job to perform, he could not make an original agreement with a union journeyman tile layer to do the work on a union basis. If the journeyman did so, he would be violating the rules of the union and subject to expulsion. The reason for it is that the union seeks to

preserve the contractor's status of its union employers. It, therefore, does not permit its journeymen to compete with the union contractor. If one sought union labor he would have to make his agreement with a union contractor, who would furnish the union employees. The union recognizes that the union contractor has an investment in his plant, expends considerable time and effort in endeavoring to secure work for his employees, and he is the one entitled to bid on the job so as to secure it and to allow him sufficient for overhead and his own living.

We recognize that the union employee may decide to violate the union rule and take a job even though in doing so he is competing with union contractors. We do not claim that it is unlawful for the union journeyman to do this. We do claim the right, however, to terminate the journeyman's membership in the union, and to endeavor to replace this worker on the job through a union contractor.

(5) *The rule is necessary to prevent a resort to the subterfuge of partnership, which would bring destruction to the unions and demoralization of industry.*

We have reserved one phase of the discussion relating to the reasonableness of the rule in order to discuss the same in connection with the case of **Hughes v. Kansas City Motion Picture Operators, Local No. 170 et al.**, 221 S. W. 95, cited by appellant. In quoting from the dissenting opinion we do so for the purpose of adopting the discussion relating to the reason for the union rule. We do not cite this dissent from a state court as authority for the principles of law discussed. If the Court should hold in the case at bar that it is illegal for the respondents to request as a condition of unionization that an employer

shall refrain from working with the tools of the trade, then the entire union may face destruction and the craft demoralized. If the rule is applicable to the appellant it must be made applicable to all persons who are employers in the industry. It must be made applicable to the partners of he appellant, and this regardless of numbers. There is no reason why he cannot take in his brother and Holly and anyone else as a partner, give them the status of employers, and thereby enable all of them to bid for contracts on a labor rate considerably less than the union scale. As a matter of fact, the appellant did enter into a partnership with one Wm. Neidner, a union tile setter, who turned in his union card on associating himself with Mr. Senn (R. 70). The reasonableness of the rule, therefore, in respect to a small craft, constituted as this craft is, is pointed out by the dissenting opinion in the **Hughes** case. In the recital of facts in the majority opinion it is stated:

> "• • • The testimony shows that there was a rigid rule of the union that no proprietor of a moving picture show should operate his own projecting machine, and that in every case a member of the union must be employed. The reason assigned by defendants for this rule is that experience had shown persons would claim to be interested as a partner in the business and to have the right to operate as such when, in fact, the claim was a subterfuge, used as a means to obtain a position as operator without becoming a member of the union and at a wage less than the union scale; that if such a rule was not enforced, proprietors of theaters, even though members of the union themselves, would be able to employ nonunion operators at a lower wage, under the guise of taking them in as partners. There was testimony, too, in behalf of defendants about the proprietors of other thea-

ters, who employed union operators and otherwise complied with the rules of the union, having complained on occasions when some proprietor was permitted to handle his own machine. • • •"

But the majority of the Court went on to say that picketing and boycotting were

"• • • for so trivial a cause. Most of the decisions were in cases of lockouts, black lists and strikes directly connected with the struggle of workingmen to better their lot, and involving large issues of general social welfare. • • •"

It is apparent that the majority of the Court was passing upon the degree of economic interest the union had in adopting the rule. We quote quite extensively from the minority opinion since it is a complete analysis of the reasons for the union rule:

"As the majority opinion states:

" '**The object of the union and its rules was to improve the condition of the members and of the laboring classes in general by increasing wages and elevating the scale of living.**' This object is to be kept in mind throughout the case. One thing the union sought was the employment of operators at a living wage. The pertinence of this as a legitimate aim toward a thing essential to the accomplishment of the purpose of the organization is apparent. The facts mentioned as arousing the interest of the union indicated clearly that there had sprung up a growing practice among exhibitors to associate with themselves nonunion operators under the name of 'partners' or with the representation that they had 'an interest,' for the purpose and with the effect of avoiding employing union operators. • • • He admitted he knew the reason the union operators objected to 'employers or owners operating their own machines was that there was

great danger of the employers breaking down the standard scale and living scale of wages as existed the country over, and thereby regulating as they saw fit the hours and conditions of labor.' • • • The reason for the rule was that if the union recognized as 'fair' the operation of their own machines by exhibitors (owners) these could, as had been done and was being done, by the simple device of dubbing a nonunion operator a 'partner' or representing that he had 'an interest' in the show, easily conduct nonunion places in competition with shows complying with union rules and 'fair' to organized labor, and thus secure the benefits of the patronage of organized labor, its friends and sympathizers, while, in fact, by this evasive method, discriminating against it. **The view of the union was that it could not endure if a practice was countenanced which in theory would afford, and in fact had afforded, and was affording, so convenient and effective a cover under which exhibitors could secure, had secured, and were securing, all the benefits of unionism and its patronage without conforming to its reasonable standards or accepting any of its incidental burdens.** • • •

"Hughes' offer, even had he made one, to join the union if they would modify their rules amounts to nothing. If he desired to join he might do so if the union would accept him. **There is nothing to indicate he had any legal right to impose membership conditions upon the union. Such offer could not affect the question here. That depends upon the identical things upon which it would have depended had he made no such offer.**"

• • • • • • • •

"I. The majority opinion seems to place the reversal of the judgment on the ground that the record shows a number of things which, in combination, constituted a nuisance. It states that (1) the union demands were arbitrary and unlawful; (2) the union was

attempting to deprive Hughes of the right to 'make a living by the work of his hands'; (3) there was intimidation of patrons; (4) that the statements made by the pickets that the theater was 'unfair to organized labor' were false statements; (5) that the rule and the picketing had no substantial relation to the promotion of the welfare of union men; (6) that some of the attendants of the theater were 'forced into unpleasant activity to preserve their patronage'; (7) that the patronage was diminished; (8) that these things show the theater was so 'beset' that a nuisance was created, and could be and should be enjoined.

• • • • • • •

"• • • To what extent will the courts decide what rules union labor organizations may adopt and follow on this question of fairness and unfairness? According to the Supreme Court of California, the justice or policy of union rules, adopted in good faith, are matter outside the province of the courts, 'and, with regard to other questions of economic or political aspect, the remedy, if remedy is needed, must be found by the Legislature.' Parkinson v. Building Trades Council of Santa Clara County, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Am. St. Rep. 1165.

"It is unnecessary to attempt in this case the formulation of the rule on this subject. There can be no question that the rule that an exhibitor who operated his own machine would be deemed unfair originated out of a real condition which threatened the welfare of respondents. Hughes admitted he knew this. **The evidence is clear that the rule was not adopted in a spirit of malice or frivolity or otherwise than as the result of a well-founded conviction that it was necessary for the preservation of respondent local and furtherance of its lawful purposes.** That the practice at which it was aimed was one of deceit and unfairness, objectionable to honest exhibitors as well as to the union, is also shown by the evidence. That the rule

had a real relation to defeating this underhand practice, and thereby preventing the disruption of the union seems apparent to the writer. In addition, it seems reasonable that the principle of the majority opinion now being discussed logically expends its force upon the question of malice. It is relevant to that inquiry when that inquiry is relevant to the issues. **The rule referred to was not a reasonless one, was adopted in good faith, had a substantial relation to the advancement of the legitimate purposes of organized labor, was not unlawful in itself, and its violation would have justified the statement that the violator was 'unfair.'**

* * * * * * *

"(4) If the picketing was otherwise lawful, the fact that appellants were forced into unpleasant activity to preserve a patronage to which they were not entitled, and which they had attempted to retain by deceit, or at any rate despite their unfairness to organized labor, is not an objection to the judgment of the trial court. If so, there is always, in every case, no matter what may be the justice of organized labor's grievance, at the disposal of every man who desires to use it, an effective method of putting injunctive processes in motion." (Emphasis ours.)

(6) *Appellant assumes that respondents are actuated by "malice," although all evidence is to the contrary, and the Court so found. Respondents' act of peaceful picketing is a lawful form of appeal to the public not to patronize appellant. The public is free to accept or reject the appeal and the appellant is free to perform all the work he can get and in whatever manner he wishes to perform it.*

Appellant fails to comprehend that the respondent labor unions and their members are not preventing the appellant

from exercising his right to work with the tools of his trade. They are exercising their own right to solicit the public not to patronize and give work to the appellant, and they are soliciting and appealing to employees not to work for the appellant. If the public, or any portion of it, is not inclined to heed the appeal and gives him work, which it has the right to do, the appellant is not prevented or hindered from performing it, and he can do so personally and with the tools of the trade. If his workers are not inclined to heed the appeal of the respondents not to work for the appellant, as they have the right to do, such workers may work for the appellant and he is not prevented or hindered from employing them. **Picketing is a means of informing the public of a labor dispute and a form of solicitation of both public and employees not to patronize the person picketed and not to take employment with him. The decision to heed such solicitation and appeal is a matter resting entirely with the public and with his workers.**

So as to clarify the issue we should like, by way of analogy, to demonstrate how untenable the position of appellant is when considered in the light of recognized industrial law.

In so far as nonunion employees are concerned, the same argument made by appellant regarding the sanctity of the right to use one's labor and to be protected in that use has been made. It is on the basis of such contentions that the great body of our labor law has grown. And out of these disputes has grown the following incontrovertible principles: organized labor may use legitimate means of persuasion to prevent the employment of nonunion men; organized labor may strike and boycott to force the recognition and adoption of the closed shop; organized labor may refuse to work with nonunion employees and by their refusal force the employer to discharge such employees; and

organized labor can go so far as to refuse to work with men whose habits, conduct and character are obnoxious to them. All these are rights fully recognized by the law of the land. That as a result of such demands others may lose their jobs and means of livelihood is not controlling, since the basic issue is the exercise of a right directed toward a legitimate end—the betterment of their conditions as a body.

Now, if one's nonunion affiliation, or habits, conduct and character constitute a justification for a combination of his fellow workmen to refuse to work with him in consequence of which their employer dispenses with his services, how can the employer object, when to further the same interests, organized labor uses the same means to prevent the employer from working with them? He still is free to do as he pleases in the case of an employee—employee conflict,—discharge the men against whom the union's efforts are directed, or continue to employ them and disregard the union's demands. In his own case he can continue to work, or, in the alternative, he might elect not to work rather than subject himself to the legitimate economic persuasion of organized labor. His rights are no greater or less than those of his employees. Nor are they greater or less than those of organized labor. Each is asserting an allowable and recognized right. As long as the means employed to secure that right are legal means, the conflict is one which falls properly in the field of socio-economics and the courts of law have no interest other than to see that neither party resorts to illegal means or violence.

The Court of Appeals of New York, in the case of **Stillwell Theater v. Kaplan**, 259 N. Y. 405, 182 N. E. 63, 84 A. L. R. 6, stated the proposition fairly when it said:

"The court of appeals has for many years been dis-

posed to leave the parties to peaceful labor disputes unmolested when economic rather than legal questions were involved. The employer, if threatened in his business life by the violence of the unions or by other wrongful acts, might have the aid of the court to preserve him from damages threatened by recourse to unlawful means, but the right of workmen to organize to better their condition has been fully recognized. The fact that such action may result in incidental injury to the employer does not in itself constitute a justification for issuing an injunction against such acts. **The interests of capital and labor are at times inimical, and the courts may not decide controversies between the parties as long as neither resorts to violence, deceit or misrepresentation to bring about desired results.**" (Emphasis ours.)

Justice Fairchild, in the case at bar, points this out very clearly, saying:

"The respondents' act of peaceful picketing is a lawful form of appeal to the public to turn its patronage from appellant to the concerns in which the welfare of the members of the unions is bound up. As stated by respondents' counsel in their brief, 'the public is free to accept or reject the appeal and plaintiff is free to perform all work he can get in whatever manner he wishes to perform it.' He may work long hours. He may bid for contracts at a low figure based on low wages for himself and on long hours. In the judgment of respondents, his conduct in this respect affects their opportunity of maintaining a standard of better wages, regulated hours and improved working conditions, and the collision of the two sets of rights, the one in appellant, the other in the respondents, creates a labor dispute within the definition of the code. Each appeals to public opinion. If the trade turns from one to the other as a result of this dispute, the injury is incidental, injuria absque damno."

(7) *Discussion of leading cases cited by appellant as to reasonableness of article III of proposed agreement.*

We submit that a close examination of the state cases cited by appellant indicates that they are not in keeping with what the trial court termed "the more recent trend of cases."

Roraback v. Motion Picture Machine Operators' Union, 140 Minn. 481, 168 N. W. 766 (1918), strongly relied upon by appellant, is the first case dealing with a like problem. In that case an injunction was sought to prevent the picketing of plaintiff's theater where plaintiff, the owner of the theater, operated his own picture machine contrary to the rule of the union. The decision dealing with the law starts out with the statement:

> "No person or combination of persons has the right **maliciously** to injure or destroy the business of another, **by acts which serve no legitimate purpose of his own.**" (Emphasis ours.)

This principle is too well established in law to permit of any argument. And likewise, when the Court goes on to say, "One man singly, or any number of men jointly, **having no legitimate interests to protect,** may not lawfully ruin the business of another by **maliciously** inducing his patrons and third parties not to deal with him," the Court in enunciating that principle states the law applicable to the case at bar. But, as we will hereafter show, the Court disregards the necessary elements of "legitimate interests" and "malice" and applies the rule as though these elements are established. The cases cited by the Court in support of the foregoing correct principle of law are pertinent in so far as "protection of legitimate interests" or conduct purely "malicious" are concerned. Let us examine them briefly:

In **Tuttle v. Buck**, 107 Minn. 145, 119 N. W. 946, the Court dealt with a situation in which a barber, to satisfy a personal grudge, opened up a competitive barber shop with the purpose of ruining the plaintiff's business as a barber. The Court held such conduct unjustifiable because it served the barber **no legitimate purpose of his own.** Even so this case is sharply criticized on the basis of free competition. See 22 L. R. A. (N. S.) 599, note.

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. Ed. 260, cited in the **Roraback** case, supra, is one which has been constantly weakened by subsequent decisions (**Amer. Steel Foundries v. Tri-City C. T. Council,** 257 U. S. 184). Nevertheless, the majority decision which is still freely quoted emphasizes interference which is **malicious.**

Ertz v. Produce Exchange, 79 Minn. 140, 81 N. W. 737, 48 L. R. A. 90, also stresses the illegality of interference with another's business where the interferers have **no legitimate interests to protect.**

Berry v. Donovan, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, in which the Court held that there was no legal justification for the defendant, a representative of a national union of shoe workers, to obtain the discharge of the plaintiff, a nonunion employee, under the provisions of a contract entered into by the union and an employer calling for a closed union shop. The closed-shop contract was recognized by many courts prior to the Code; it is valid under the Code, as held in **American Furniture Co. v. I. B. of T. C. & H. of A. et al.**, 268 N. W. 250.

So the case is no authority for the proposition.

We should also like to call attention to the fact that the case of **Jacobs v. Cohen**, 99 App. Div. 481, 90 N. Y.

Supp. 854, cited in the **Berry** case, supra, in support of the Court's decision, was reversed by the Court of Appeals in New York, 76 N. E. 5, 2 L. R. A. (N. S.) 292, in which case it was held that a contract to employ union labor only is not void as against public policy.

Willner v. Silberman, 109 Md. 341, 71 Atl. 962, 24 L. R. A. (N. S.) 895, in which the Court held that the circulation of a so-called "black list" by an employer, not stating fairly the reasons for the discharge of the complainant employee, was actionable. The case contributes nothing to the solution of the problem which the Minnesota court was trying to reach, except to illustrate what is unjustifiable interference.

Gray v. Building Trade Council, 91 Minn. 171, 97 N. W. 663, 1118, 63 L. R. A. 753, which merely declares a boycott illegal, and which no longer is, under the Wisconsin Code.

Brennan v. United Hatters, 73 N. J. L. 729, 65 Atl. 165, in which the Court was concerned with the union's arbitrary discharge, discipline and punishment of one of its members, with his resultant loss of position in a closed union plant, and held that the plaintiff was not given the fair trial to which he was entitled. The Court says that a man has the right to be free from hindrance in his work, except as may result from the exercise of **equal or superior rights**, including **fair competition**. Also, "**rights, like all other rights in a state or society, are qualified to a considerable extent when they come into conflict with the rights of others.**" (Emphasis ours). That is precisely respondents' contention here.

Hundley v. Louisville & N. R. Co., 105 Ky. 162, 48 S. W. 29, 63 L. R. A. 289, in which the Court again was concerned only with a **malicious** blacklist.

Erdman v. Mitchell, 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, in which the Court declared a strike illegal because there was not peaceful persuasion. But affirmed the right of trade unions to cease work for reasons satisfactory to their members.

De Minico v. Craig, 207 Mass. 593, 94 N. E. 317, in which the Court held that personal objections to a coemployee were not asserted in good faith or for a legal purpose. There are many later authorities contra, but regardless, the case is not in point with the proposition that the Minnesota court is trying to prove.

Perhaps we have gone far enough in analyzing the **Roraback** case. There can be only one conclusion. That the Court very correctly enunciated the rule of law when it stated that "no person or combination of persons has the right **maliciously** to injure or destroy the business of another, by acts which **serve no legitimate purpose of his own**," but went far afield in attempting to get the facts of their case to fit in with that proposition. It made no attempt to ascertain whether the acts were "malicious" or not, or whether the union was serving a legitimate purpose of its own. No reference is made to that phase of the case, and the Court blandly proceeds to assume what it was under compulsion to prove by its own rules governing such situation.

We also should like to refer the Court to that part of the majority opinion in the **Roraback** case which reads:

> "The case is presented upon the pleadings and upon affidavits pro and con; it has not yet been tried. **If, when the case is tried and findings are made determining the facts, it shall appear that plaintiff's contention is correct,** he is entitled to relief, **but we can-**

not say that the trial court abused its discretion in refusing to issue an injunction before the facts are ascertained; and the order appealed from is affirmed." (Emphasis ours.)

The "contention" referred to is the argument made that "the purpose of the defendants is to injure and perhaps destroy plaintiff's business unless he accedes to their demands." If that was the **sole** purpose of the defendants in that case we accept the case as controlling here, if the Court had found that was also the purpose here. But if, on the determination of the facts in the **Roraback** case, it were found that the purpose was not to injure and destroy plaintiff's business, but for the legitimate end of furthering their own legal interest, and the injury complained of was only incidental (and that is the respondent's position in the present case), then it is clear that plaintiff's contention was not correct and he would not be entitled to relief in that case.

However, we direct the Court's attention to the concurring opinion of Justice Hallam, which clearly and succinctly states the proposition contended for by the defendants, and which was adopted by the trial court in the instant case:

> "I do not understand that the right of a man to work in his own business is questioned, nor do I understand there is any claim of right of defendants to destroy plaintiff's business on any ground.
>
> "I understand that the defendants have the right to refuse to work as fellow workmen with nonunion men or **with an employer**, and that they have the right in a proper and orderly manner to advise one another, or the public, **that a certain employer does not employ union operatives, or that he insists on operating his own machines. It seems to me that the**

main question is whether the conduct of defendants has amounted to more than that. If not, their acts have not been unlawful." (Emphasis ours.)

This statement clearly establishes the proper approach to the problem. It is the position which the respondent here takes, and is a reiteration of respondent's claim that appellant has the right to refuse to unionize and has the right to work in his business with the tools of the trade. But respondents are asserting their own rights, secured to them by the common law and the Wisconsin Labor Code; and in the assertion of those rights are using legal means at their disposal.

The position of the defendants throughout this case has been in conformance with the rule of Justice Hallam in the **Roraback** case. In the transcript of the record, page 67, appears a colloquy between the Court and respondent's counsel. During the colloquy counsel stated:

> "It is not a question of whether we permit him to work. He can work all he pleases, or operate a non-union shop. He has a right to operate a nonunion shop. I want to make that as clear and emphatic as I can. It is his legal and definite privilege to operate a nonunion shop. That is his legal and absolute right to pay ten cents an hour if he can get them. But it is our right again, the union right, to endeavor to secure from him a union contract, or have him run a union shop. And he can refuse to do it, but we will bring economic pressure to make him do it."

In 3 **A. L. R.** 1295 appears a note in connection with the **Roraback** case. We quote from it:

> "Although the conclusion reached in the reported case commends itself as a proper one, some of the

language used therein, so far as it conveys the impression that any attempt to deprive a person of the right to work in his own business is necessarily unlawful, would seem to require qualification. If one's habits or conduct or character may constitute a justification for a combination of his fellow workmen to refuse to work with him, in consequence of which their employer dispenses with his services (citing cases), it would seem that one's employees might, on like grounds, lawfully combine to refuse to continue in his employment, although, when confronted with the alternative, he might elect not to work, rather than to part with his employees. **So, also, it would seem that in order to procure the work for themselves, one's employees might lawfully give their employer the option of relinquishing the work done by him, or or doing without their services** (citing cases)." (Emphasis ours.)

In the case of **Finke v. Schwartz**, 20 Ohio (N. P.) 407, the Court was confronted with precisely the same situation as in the case of **Roraback v. Motion Picture Operators**, supra. The Court considered the Roraback case, but adopted the special concurring opinion of that case, set out at page 44 of this brief, and denied the application for injunction.

In the case of **Hughes v. Kansas City Motion Picture Operators**, 282 Mo. 304, 221 S. W. 95 (1920), cited by appellant, the Supreme Court of Missouri held that a demand made by a union that the proprietor of a theater do not operate the picture machines used in the theater is arbitrary and unreasonable. Here again we have the unfortunate situation of an appellate court speaking about absolute property rights in one breath, and qualified rights in another breath, without making any attempt to recon-

cile the two. Abstract propositions of law are flung about in abundance, unanchored by fact, reason or reliable authority to the specific case before the Court.

It isn't until we reach the dissenting opinion, written by Justice Blair, and concurred in by Justice Williams and Chief Justice Walker (already discussed at pages 33-36 of this brief) do we find any discussion of the specific problem, i. e., is such demand a reasonably just one, advanced in good faith for the legal purpose of improving the conditions of the members and of the laboring classes in general by increasing wages and elevating the scale of living? This dissent disposes of the problem in the only logical way that it can be done—by taking into consideration the objects, purposes and reasons for the union demand, analyzing the facts closely, and then placing its decision on the result of such analysis. Even so, the dissent calls into question the Court's power to decide at all on such issues, particularly where the dispute is close, by calling attention to the decision by the Supreme Court of California in **Parkinson v. Bldg. Trades Council**, 154 Cal. 581, 90 Pac. 1027, 21 L. R. A. (N. S.) 550, in which case the Court said that the justice or policy of union rules, adopted in good faith, are matters outside the province of the Court, "and with regard to the questions of economic or political aspect, the remedy, if remedy is needed, must be found by the Legislature."

Appellant also cites the case of **Parker Paint and Wall Paper Co. v. Local Union No. 813**, 87 Va. 631, 105 S. E. 911, 16 A. L. R. 222. In that case the plaintiff was granted an injunction because the defendant union had resorted to an illegal secondary boycott. And while the Court makes the statement that members of labor organizations cannot object to an employer laboring with his hands in perform-

ing his own contracts, it makes that statement as obiter dictum, not being called upon to decide the issue. Since no attempt is made to fit the case into the accepted rule by examining the facts, we submit that it should not be considered authority in the case at bar.

(8) *If appellant's right to the free use of his hands is illegally invaded by article III of the proposed agreement, then it is equally invaded by a provision in an agreement that he work only eight hours per day; and that he refrain from working on Sundays, because these, too, are restrictions on his right to the free use of his hands. Such contention demonstrates its own fallacy.*

Appellant repeatedly emphasizes the contention that appellant is being denied the right to the free use of his hands and against his will. As we have pointed out, we do not deny that appellant has the right to the use of his hands. We are merely asserting the respondents' own rights in the competitive struggle to have more use of their own. If in such competitive struggle, and by the use of lawful means, appellant should find that he has a dearth of work upon which to exercise the free use of his hands, it is an incident of a lawful economic struggle for which the law affords no redress to either side. However, the claimed right to the free use of one's hands is subject to qualification. There are lawful impediments, restrictions, and regulations to, and even denials of, the free use of one's hands.

A workman has not the absolute right to the free use of his hands, so that the Legislature cannot deprive him of the same. The rule must be read in its qualified sense, for certainly the Legislature may prescribe that one may not work in a trade unless he has undertaken a course of

learning and apprenticeship to acquire requisite skill to perform the work he desires to perform. Thus by our own laws no person can do or perform all manner of plumbing work unless he qualifies as prescribed by Chapter 145 of the Wisconsin Statutes. A board is set up to conduct examinations as to qualifications of the persons desiring to work at the trade. An apprenticeship must be served for a period of five years before he can qualify "as a skilled mechanic in the art of installing plumbing work." A mere possession of practical knowledge will not suffice. The person must comply with the prescribed legal requirements. Here we have an illustration of a rule as rigid as that required of persons desiring to enter the professions.

The isolated expression that every man has the right to the free use of his hands must be considered in the light of the business he is engaged in or wishes to engage in. As an abstract proposition it sounds well, but it is not the law. One may own a business and yet not be permitted the free use of his hands in performing practical work in the business. A man may own a barber shop and yet may not be permitted to work as a barber. A man may own a pharmacy, and yet may not be permitted to fill prescriptions. One may own a beauty parlor and yet may not perform the practical work of the beauty operator.

Ownership of business does not necessarily carry with it the right to work with the tools of the trade.

It may be argued that in the illustrations given the law steps in, under the police powers of the state. But it establishes that there is no absolute right to work at whatever one chooses as his employment. It establishes that the extravagant statement that a "workman has the right to the free use of his hands, a right which the Legislature cannot deprive him" is mere oratory when asserted as an unqualified rule of law.

Appellant contends in his brief (pp. 47, 48) that the demand that a man "cease to work with his own hands in his own lawful business is so shocking and so intolerable that the natural inference of the human mind would be that under constitutional government" a statute legalizing picketing would be impossible. We do not know why an economic organization suffering from the unfair business methods of another should not be permitted by lawful economic persuasion to do that which, in principle, the legislatures of all states do at every session, that is, regulate or prevent competition that is destructive of fair standards in the industry. In order not to destroy an industry the legislature requires persons seeking to work in and conduct certain businesses to secure certificates of convenience and necessity before having the right to go into business. These certificates of convenience and necessity are frequently refused if there is adequate service and if granting another will destroy those already in it.

It is urged that this is a denial of a man's right to perform the work he chooses to do, but the union here does not deny Senn's right to work; it seeks to divert as much of the work in the industry as it can divert to itself; if successful, Senn will cease to be a destroyer of the welfare of the trade. But aside from that, is it any more illogical for an economic organization seeking to preserve, maintain and improve working standards, to ask the unionized employer not to work in competition with his employees than to demand of him that she shall not work in excess of eight hours a day, that he shall not work on Sunday? If he is free to work in the business, should he not be just as free to work in it as he sees fit, there being no statutory inhibitions? Carrying the argument further, why should a union have the right to say to one who is

free to work with his hands in competition with his employees that he shall not work longer than eight hours a day if he cannot live unless he works twelve hours a day? Why should it say to him that he shall not pay his employees less than $1.25 an hour, if he cannot live by paying more than 65 cents an hour; each demand, backed up by economic persuasion, which may prove effective and thus put him out of business is just as much an interference with his right to work as is the demand that he shall not compete with his employees by working at the trade; and yet the demands that he conform to a wage scale and to certain hours are valid, though producing the same effect.

We argued the foregoing to show the absurdity of the contention made, although the true answer is that he can work long hours; he can refuse to unionize his shop; he can employ others at 65 cents an hour; but if in doing so he inflicts an injury upon another, that other at least has the right under the law to compete with him and make his methods known, even if it inflicts injury upon him.

As Mr. Justice Fairchild says:

> "• • • it is apparent that under the laws of Wisconsin, where the primary purpose of the acts complained of is to protect and improve the condition of those whom the unions represent, such action is justifiable because it tends to promote the welfare of the members of the union engaged in the same craft."

Of course, counsel argues, as does the appellant in the **American Furniture Company** case, that the controversy must be between the employer and his employees, but our court points out that the plain unambiguous provisions of the code extends the **Clayton Act** and the narrow construc-

tion given it in the **Duplex** case to bring within the classification of disputants "an association of employees" "regardless of whether or not the disputants stand in the proximate relation of employer and employee."

Justice Wickhem in the **American Furniture Company** case says:

> "Thus, it coming to the attention of a union that a particular employer (1) is paying extremely low wages to workers in the craft it represents, or (2), is insisting upon unduly long hours of labor, or (3), is refusing to hire union labor or to permit members of a union to work for him, it could make demands for changes and, upon refusal of these demands, be considered a party to a labor dispute and entitled to the exemptions of the act."

(9) *The burden of proving that the union demand is unreasonable is on the appellant.*

And, before leaving this aspect of the case, respondents respectfully point out to this Court that the appellant has failed to carry the burden imposed upon him by law, i. e., of proving the unjustifiability of the union's demands. As was said in **Barker Painting Co. v. Brotherhood of Painters**, 15 F. (2) 16 (1926):

> "Insistently urging the rules in question and the manner of their enforcement by the union are unjustly discriminatory against the complainant and all other employers similarly situated and operate to the injury of the public • • •, the complainant further urges that the rules are not for any justifiable or indeed for any visible benefit to the laborers themselves except that thereby they may arbitrarily obtain higher wages in given circumstances, and that no ground or reason has even been intimated by the

union or its counsel for justifying them. **In this proceeding the burden of justifying the rules does not rest on the respondents; it is the complainant who pressed for a preliminary injunction before the answer was filed to establish that the rules are unlawful by evidence sufficient to invoke that extraordinary remedy."** (Emphasis ours.)

B.

The Provision of the Union Constitution That No Member May Work With an Employer Who Works With the Tools of Their Trade and Who Is Not a Qualified Craftsman, as Defined in the Union Rules, Would Bar the Appellant From Working With the Tools of the Trade, as a Union Contractor, Even if Article III of the Proposed Agreement Were Dropped Out. This Provision of the Union Constitution Is a Reasonable One. The Apprenticeship Rules of the Union Are Reasonable.

In the accompanying brief on jurisdiction we pointed out that by virtue of rules relating to apprenticeship, and prohibitions against union men working with an unskilled craftsman (which the appellant in this case is), the union could only unionize him on the basis that he refrain from working with the tools of the trade. We now contend that if the Court is of the opinion that article III of the proposed agreement, to which the appellant objects, is an unreasonable provision and that by virtue thereof respondents have no dispute with appellant, there is, nevertheless, the dispute arising from article XX, section 6, which prohibits union men from accepting employment with a contractor who is not a practical tile setter and who insists on working in competition with them with the tools of the

trade. We direct the Court's attention to the findings of fact made by the trial court that appellant was not a practical tile setter within the rules prescribed by the union (R. 28, Finding 16). These findings were affirmed by the Supreme Court of the State of Wisconsin. It is respondents' contention that the rule here discussed is reasonable, and having been so found by the Court the judgment in the case rests upon an issue of fact, and that regardless of any other questions raised, respecting other demands and the reasonableness of them, there is no longer any constitutional question in the case.

We come now to discuss Article XX, Section 6 of the International Constitution, which reads as follows:

> "Members of the I. U. shall not accept employment with a contractor who works with the tools of the trade unless said contractor is a practical bricklayer, stone mason, cement mason, plasterer, marble mason, tile-setter, mosaic or terrazzo worker.
>
> "This section shall be inserted in all subordinate unions' by-laws."

This same rule is contained in respondents' local by-laws section 30:

> "Members shall not accept employment with a contractor who works with the tools of the trade unless said contractor is a practical tile-setter."

(We shall refer to this rule as article XX, section 6.)

While this rule is a prohibitory one as to union members, its effect is the same as article III of the agreement on the nonjourneyman employer. Such employer, not being a practical craftsman, cannot have a union status if he persists in working with tools of the trade. Article XX, section 6, applies to all the crafts affiliated with the In-

ternational Union. It was in force for many years prior to the dispute with appellant, and was in force at the time of it. It has never been repealed. Although article III of the proposed agreement accomplishes the same result as article XX, section 6, article XX, section 6, does not accomplish the same result as article III of the agreement. Article III does not displace article XX, section 6, although in covering a wider field it does what article XX, section 6, does.

Therefore, if for any reason article III of the agreement is invalid, we are still confronted with the problem of the validity of the rule in article XX, section 6.

Although appellant lays stress on article III of the agreement, article XX, section 6 of the constitution is equally important, for it presents another reason for the refusal of the union to place Senn in the category of a union contractor. Appellant's willingness to sign a union contract on condition that he be permitted to work with the tools of the trade is violative of that provision of the constitution which prohibits union employees working with a contractor who is not a practical tile setter.

Respondents contend that appellant was not asked, as a condition of unionizing, to lay down the tools of **his** trade. He was asked to lay down the tools of **their** trade (R. 83-84). They contend he was not a practical tile layer and they could not work with him under the rules of their constitution. The union has certain standards by which it determines who is a skilled craftsman. It requires that a person shall serve an apprenticeship of three years and take some special educational course in the craft. This is by no means an unreasonable requirement. At least the appellant has not proven it to be unreasonable. In fact, there must be something to skilled craftsmanship, since the appellant insisted that if he operated a union shop he

wouldn't take anyone the union supplied him, but he would insist upon a competent mechanic.

"Q. Are you willing to take any member of the union to work for you? That is up to the union who shall work for you?

A. I wouldn't go that far. The man that the union gives me would have to be a competent mechanic" (R. 58).

It is generally known that in those skilled crafts allied with the building trades a minimum of three years apprenticeship is required before one is classified as a journman entitled to do tile setting.

Article XVI of the International Constitution provides:

"Sec. 3. **All apprentices should attend a technical night school for one year during their term of apprenticeship or take up a home-study course which shall have been approved by the Executive Board.**

"Sec. 4. No subordinate union shall be allowed to indenture apprentices to journeymen, but only to recognized union contractors of their jurisdiction.

"Sec. 5. Should any employer or firm suspend or give up business, it shall be the duty of the subordinate union to aid as far as possible any apprentices that may be thrown out of employment and desire to finish their time, and at the expiration of their apprenticeship they shall, if found competent, be entitled to journeymen's wages upon joining a union. No subordinate union shall be allowed to indenture any apprentice to firms, corporations or manufacturers inside of the jurisdiction of any other subordinate union.

"Sec. 6. Any apprentice leaving his employer before his time of apprenticeship expires without a written discharge from his employer, stating cause, etc.,

or in the event of the death of his employer, or as before provided in Section 2 of this Article, shall not be countenanced by any subordinate union working under the jurisdiction of the International Union, nor shall the members of this I. U. work with such apprentices until the provisions of the preceding section have been complied with.

"Each and every apprentice binding himself to serve a stated term shall be required to fill his contract with his employer or leave the business entirely.

"Any member of the I. U. who knowingly vouches for the initiation of a runaway apprentice in any subordinate union shall be fined $10.00.

"Sec. 7. **All regularly assigned apprentices shall be required to serve not less than three years.** Subordinate unions will not be allowed to issue permits to any apprentice known as 'roving permits'; this part not to relate to apprentices of bona fide contractors of a city who may from time to time take contracts outside of the jurisdiction of the subordinate union in which the apprentices are enrolled.

"Sec. 8. The International Union recommends that each subordinate union make such terms or stipulations in the filling out of indenture papers as they in their judgment may deem best. **But no contract for indenture shall be made for a term of less than three years.**"

It is admitted and established that the appellant has never served a three-year apprenticeship (R. 68):

"Mr. Engelhard: We will stipulate that he (Senn) has never had the apprenticeship as prescribed by the union. We will stipulate that the three-year apprenticeship, which the union requires of apprentices, has not been had by Mr. Senn.

The Court: That is all Mr. Padway is seeking to show.

Mr. Padway: Will you stipulate, too, that the requirements of the union in connection with the attendance at a technical high school during that apprenticeship, or taking up a home study course, which is approved, has not been complied with?

Mr. Engelhard: We will stipulate that as a tile layer he has never gone to night school.

Mr. Padway: He has never gone to a night school or studied anything in connection with tile laying?

Mr. Engelhard: That subject is now covered."

He worked as a laborer and he claims as a tile setter for a period of eight or ten months in Florida. The fact that he has continued to work in the trade or craft since 1931 without serving his apprenticeship does not entitle him to be classified as a skilled craftsman because he has not complied with the rules determining that he is a skilled craftsman. This rule from a union point of view is as reasonable and as sound as the rules of those states requiring one preparing for the bar to take pre-legal training, and three years of law before being admitted to practice his profession. The fact that one may sit in a law office and acquire a practical knowledge of the law is not, in those states, a permit to practice law. What professions claim for themselves, unions should not be denied to claim for their craft. In fact, the unions believe that as much skill enters into a machinist's work, into setting up structural iron, into performing cabinet carpentry, into setting tile, as in practicing medicine, law, dentistry, etc. These rules are specially devised to prevent an individual from working in the trade for a short period of time, then holding himself out to the world as a skilled craftsman. The rule is designed to prevent the very situation disclosed by the case at bar, that is, eight or ten months as a laborer and tile setter, then under the status of "contrac-

tor," working with the tools of the trade, thus displacing workers who have given years to an apprenticeship in order to acquire the classification of skilled journeymen craftsmen. Craftsmen are rightfully jealous of their right to use the tools of their craft. This is emphasized in the following question and answer of Mr. Schreiber:

> "Q. I know that. Let's get that clearly. It covers the laying down of his tools.
>
> A. They are not **his** tools. That is the argument" (R. 83).

Can it be held that this union rule is unreasonable? Yet that is one of the reasons assigned by Mr. Schreiber why the union could not unionize the appellant if he insisted on working with the tools of the trade. We direct the Court's attention to Mr. Schreiber's testimony (R. 34) to the effect that Senn was not, according to union rules, entitled to work as a journeyman craftsman.

It is an inviolate union rule that a helper shall not do a journeyman's work. This rule is so firmly entrenched in union labor relationships that no employer questions the reasonableness of it, yet here is a man who assumes the status of contractor and works as a journeyman in the trade, which he would not be permitted to do if he were a union helper. If union helpers are obliged to accept this rule, should union journeymen be obliged to see it invaded by a person not a journeyman just because he goes into the contracting business? Is the union obliged to give greater protection to a nonjourneyman contractor than it gives to a nonjourneyman union employee? That would be the effect of granting a union contract to the appellant on his terms. It would permit every helper to obtain the status of a journeyman or at least do journeymen's work by announcing that he is a contractor. If there is any-

thing that would be suicidal to the industry insofar as the union journeyman worker is concerned, it would be that policy.

For the appellant, in this case, to perform journeyman's work is as detrimental to the union's interests as for appellant to employ helpers as journeymen. If he did so, and the union requested him to unionize his shop and thus obviate the employment of helpers as journeymen, and he refused, would not that constitute a labor dispute? Yet, if appellant's contention is correct he should be permitted to say: "You have no dispute with me since I am willing to sign a union contract except for the one provision that helpers cannot do the work of journeymen. The pay of helpers is less than the pay of journeymen. By the arrangement for utilizing helpers as journeymen, I can continue in business. By employing only journeymen in journeymen's work, I cannot continue in business." Thus the appellant would be permitted to determine the reasonableness of a union rule upon his standards based upon his ability to continue in business.

If the Court accepts appellant's contention, then it must hold that the rule of the union that an employer cannot be unionized if he is not a skilled craftsman, and insists upon working with the tools of the trade, is unreasonable. The Court must hold that the distinction between "journeymen" and "helpers" is an unreasonable one. The Court must hold that the union distinction between "contractor" and "employee" is unreasonable.

Article XX, Section 4, of the International Constitution, under the heading, "Powers reserved to subordinate unions," provides:

> "It shall define the distinction between contractors and journeymen, and state those who are eligible to membership."

Unions recognize the distinction between employer and employee. It is universal that unions will not take into their membership an employer. One reason is it cannot regulate the wages of the employer. It therefore says to him: "Your business is that of contractor. You confine your activities to that work. Ours is that of craftsman."

The following letter of the secretary of the union to its international is significant (R. 78, 79):

"Secretary J. J. Gleeson

Milwaukee, August 23rd, 35.

Dear Sir and Brother:—

In answer to your letter of the 19th inst., wish to state that Sec. 6 of Article 20 of the I. U. Constitution covers Mr. Senn's complaint.

He was a plastering contractor, a nonunion one at that, before entering the tile business.

He has consistently hired nonunion tile setters and acted as helper and slowly broke into the game, and we feel that he either be a tile contractor or go back to plastering.

Fraternally yours,

Charles Schreiber, Secretary."

Appellant was informed he was not a bona fide journeyman.

"Shortly after I wrote the letter to Mr. Gleeson, Mr. Schreiber stopped in on one of my jobs and we started talking about this. He inferred—he said he didn't think there would ever be a chance of my using the tools. I says, 'Why?' 'In the eyes of the union you are not a bona fide journeyman tile setter.' I says, 'Charley, how long must this go on?'" (R. 79).

Testimony of Mr. Melville, officer of tile setter's union:

"None of the firms who have entered into union contracts employ their head men or officers or partners as craftsmen in the industry since they signed the contract.

There has been a dearth of work in the industry for the last few years for craftsmen. If an employer is engaged in the industry, that has a tendency to lessen the number of union men who may be employed in the industry, and our aim is to give more work to the members of our craft. I think that the rule of the International Union to the effect that the union employe cannot work with a contractor who works with the tools of the trade who is not a practical craftsman has been there since we have been affiliated with the Bricklayers and Masons Union, July, 1918. I am referring to the provision in the constitution. That rule has not to my knowledge been set aside by the local.

There is a distinction between contractor and journeyman. He may be a contractor and a journeyman, or a contractor and not a journeyman.

Q. What does your union judge Mr. Senn?

A. We have not to date placed him in the journeyman.

Q. It is based on his failure to acquire the skill and craftsmanship as prescribed by the union in the last eight or ten years?

A. That is right as far as I should say" (R. 87-88).

Mr. Schreiber, secretary of the union, states it another way:

"As to the present purpose of the union in picketing Mr. Senn at the present time, our union, or, rather, the trade of the tile layers for the last two or three years has been so demoralized **by the outside fellows cutting into our trade**, which don't belong, and even

those who do go out contracting, and our union is so developed we have to do something to try to eliminate that source of supply'' (R. 83).

There is nothing novel in workers classifying and limiting the kind of work to be performed by different workers in the same industry. That a helper cannot do a journeyman's work is the universal rule in the building crafts. The unions maintain an extensive system known as craft jurisdiction, allocating to various crafts the work to be performed by each craft. Thus a stationary engineer able to perform electrical work may, nevertheless, be restrained from performing such work, since the jurisdiction to perform it is granted to the electrical craft. A carpenter able to install weather strips on windows may, nevertheless, be restrained from performing this work, since the jurisdiction to do it is granted to the sheet metal workers. These regulations make for better craftsmen, orderliness and fair distribution of labor. The union here says that an employer, as an employer, is in a different classification and should confine his activities to that of contractor and not craftsman, particularly so when he is not a craftsman according to union standards.

The union rule, therefore, prohibiting journeymen craftsmen from working with a contractor using the tools of the trade and who is not a craftsman within the definition of union rules is not arbitrary, unreasonable, and is for the protection of legitimate interests of union members. The unions believe that all employers should be unionized. They find that necessary for their welfare. They find, too, that one who is not a skilled craftsman should not displace men who are. There is as much justice and reason in this rule as there is in statutes prohibiting persons from practicing law, medicine, etc., who have not qualified according

to the rules prescribed. It would be tragic, indeed, for organized labor if courts were to say, in the furtherance of the interests of its craft, a union cannot prescribe such rules and cannot seek to foster and protect them.

We do not think the Court should so hold, for it would be in direct contravention of the public policy of the state. Sec. 133.07 (1) (Wis. Stats. 1935) declares:

> "**133.07. Working people may organize; injunction not to restrain certain acts.** (1) Working people may organize themselves into or carry on labor unions and other associations or organizations for the purpose of aiding their members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of sick, disabled or unemployed members, or the families of deceased members, or for such other object or objects for which working people may lawfully combine, having in view their mutual protection or benefit."

C.

This Case Involves a Legitimate Economic Conflict and the Courts Should Not Intervene.

The issue therefore resolves itself down to this. The appellant is willing to sign a union contract, but not on the terms and conditions submitted by the union. Appellant will not unionize his plant, unless there be deleted from the contract the condition that he refrain from working with the tools of the trade as a tile setter and helper. It is the appellant's contention that such rule amounts to an illegal and unlawful demand because it invades his con-

stitutional right to work with his hands in the practical work of tile setters. The respondent unions, on the other hand, contend that the conditions submitted to the appellant that, in order to be accepted as a union contractor, he must refrain from working with the tools of the trade, is lawful, reasonable, arising out of the necessities of the craft, and for the promotion of their welfare and interest as workers in the industry; that the refusal by the appellant to sign the contract because it contains such reasonable rule is a refusal to comply with the request that he unionize his shop, and because of such refusal a labor dispute exists between the parties, entitling the respondents to the protection of the Wisconsin Labor Code and to exert such economic pressure as is declared to be lawful in furtherance of labor disputes.

Sentimental appeals and arguments do not meet the issue.

Appellant's approach may appeal to one from the sentimental viewpoint, that is, that the appellant cannot give up the right to work with the tools of the trade, since if he does, he faces ruin and will have to go out of business. Is the appellant any different than thousands of other business men who, for one cause or another, are subjected to demands which they cannot meet, for if they do they face ruin and will have to go out of business? Time and again employees demand of their employer increased wages or shorter hours, or better working conditions, and time and again the employees are met with the answer that to grant the demands will bring on ruin for the employer and cause him to go out of business. Has any court deigned to take sides in such a controversy to say to the employees: "Your demand of the employer that he pay one dollar an hour is illegal because the employer cannot continue in business if he has to pay that sum as wages"?

We do not know of a single decision so holding since those of one hundred years or more ago when it was held that laborers entering into combination for the purpose of demanding increased wages were engaged in an illegal conspiracy. In recent years, no courts have restrained employees from exerting economic pressure in furtherance of such demand, regardless of the fact that the employer will face ruin if he accedes to them.

It may well be that Mr. Senn, as a contractor, may be unable to meet the wages or conform to the hours or the other working conditions demanded without facing ruin and going out of business. This plea of facing ruin if the demands are met is not one for the courts to determine. Numerous employers make that same claim whenever any fundamental demand is made for the improvement of working conditions. The textile manufacturer of the North opposes abolition of child labor because it will put him at an economic disadvantage when he competes with the textile manufacturer of the South. Numerous employers made the same argument in respect to cost of improved sanitation—that it would reflect itself in the price of the sale of commodities, and those in competition with employers who are not subjected to this cost will be ruined. It is a recognized social and economic fact that some employers are not, and will not, be able to meet legislative demands, demands of labor, or other competitive demands, and will face ruin, but that does not place the stamp of illegality upon the demand.

The question here is a simple one. Has the union the right to seek unionization of a nonunion employer because his methods of operating his business are detrimental to the trade and craft in which the union employees are engaged? If they have, have they the right to establish rules and demand terms and conditions which are reasonable?

Now, here is a demand by a union to conform to a definite wage scale prevalent in the major portion of the industry; to conform to a fixed number of hours prevalent in the industry; to conform to rules of apprenticeship and other working conditions prevalent in the industry; and, to conform to a rule that the employer refrain from personally working with the tools of the trade, also prevalent in the industry. In the instant case, the latter requirement is as important and vital to the craftsmen affiliated with the respondent unions as are wages, hours, sanitation and other working conditions. Here is a craft where from 112 members in the union they have gone down to 41; a craft affiliated with that portion of industry known as building trades, which has suffered during the six years of the depression.

> "In the last four or five years the building industry has been depressed. There has been very little activity in the building industry. I assume that many tile setters have had to resort to other occupations in order to secure employment by which to live. I knew that some of the craftsmen were on relief. In 1935, the year 1935 showed a considerable increase over '34" (R. 76-77) (testimony of appellant).

As a necessary requisite for a proper existence and livelihood, these craftsmen find it necessary to require this rule. The contention of the employer that he will be ruined and go out of business if he obeys the rule is answered by the contention of these employees that they will be ruined and have to work at conditions less than those considered consistent with a fair standard of living if he does not; and equally disastrous, the appellant's conduct will cause others to do as he does, and thus injury will result to their entire craft. As between the two, the employees say that from their viewpoint it is better for appellant to go out of busi-

ness than for them to have less than what is necessary for a fair livelihood.

This is an economic conflict. Why should the Court take sides with one or the other? Appellant may be able to secure all kinds of work from those who believe in nonunion principles. The unions are anxious that he should not secure work from those who believe in union principles.

Appellant is not without argument and economic persuasion in opposition to that of respondents. He has that potent argument, which most nonunion contractors have—the ability to offer cheaper bids because of cheaper labor cost—and we hardly believe the balance of economic persuasion is in favor of union workers, for cheap prices have a greater appeal than other economic considerations with many persons.

There is a vast field in which appellant may indulge his right to work as a nonunion contractor and to personally work with the tools of the trade.

John D. Edwards, a contractor for twelve years, stated that Senn had performed a dozen jobs for him in the year 1933-1934 (R. 81-82; Old R. 191). This man evidently subscribes to the principles of hiring nonunion contractors. If he and others like him have work to do, he has the right to give it to Senn and Senn has the right to perform it; and as has been stated the union does not question that right. All the union claims is its right to request Mr. Edwards not to give Senn the work. The compliance or lack of compliance with this request by Mr. Edwards is not an invasion of Mr. Edwards' right to give Mr. Senn the work or Mr. Senn to perform it. If Mr. Edwards' testimony is correct, and he being a witness called by the appellant, therefore his testimony should, in so far as appellant is concerned, be taken as a verity, then there is a vast field of work for the appellant. According to

Mr. Edwards, in the "home building" end of the business contractors never paid much attention to whether union or nonunion contractors "do the work." "In the home industry I would say 10 per cent are unionized" (Old R. 194). He admitted employing mostly nonunion labor because 90 per cent of the labor in home building is nonunion. If the field of activity is as large for the appellant as Mr. Edwards claims it to be the appellant surely should not complain of efforts on the part of the union to secure some of this work for their own employers and thereby for themselves.

(1) *In the economic conflict the appellant may use all lawful means at his command to convince the public to trade with him as a nonunion contractor.*

Appellant may use all propaganda at his command to foster nonunion principles. He may join organizations which are well known, and which spend millions in fostering nonunion and open-shop policies, etc. There are the Chambers of Commerce, etc. In Milwaukee County there has existed for many years an employers' council committed to an open-shop policy. There is nothing to prevent appellant from meeting argument with argument, and associating with organizations which will help him spread his nonunion beliefs or status.

Labor unions do not claim that such organizations are illegal or that such efforts on the part of the employers are illegal. They counter the attack by inducing workers to join labor unions and by inducing employers to unionize. Those who are recalcitrant are met with the publicity that such employers are antiunion, and the request is made that the public refrain from patronizing such nonunion employer. Such attempts by labor unions by the use of the primary boycott, picketing, solicitation

of customers, have been declared both by courts of many states and by the Wisconsin Labor Code to be lawful.

Appellant is a nonunion contractor. He refuses to be unionized on the terms and conditions prescribed by the respondents. The respondents, therefore, in an orderly manner are advising the public that appellant is a nonunion contractor and that he insists on working as a nonunion contractor. Because they have demanded that he unionize and because of his refusal to do so, they are in dispute with him.

We submit, in the exercise of his rights, the appellant may secure and do all the work he pleases. He may work with his employees and with the tools of the trade. He may work long hours; he may pay low wages. He may bid for contracts at a low figure based upon low wages and long hours. He may do all these things. Those are his rights, nor do we question his right to do these things. The union members, on the contrary, are in competition with him, and the employers for whom they work are in competition with him. These union men want work for themselves, and consequently more jobs for their employers to furnish them with work. They want to maintain a standard of better wages, regulated hours and improved working conditions. Those are the rights of the union. They, therefore, have the right to oppose appellant on the economic field by informing the world that he is a low-wage contractor, a long-hour advocate, and one who insists on working with the tools of the trade in competition with his workers. Through this notification to the public they propose to compete with appellant for tile work jobs. They propose, by this notification to the world, to secure employment for themselves instead of the appellant securing it for himself. This economic conflict creates a "labor dispute" within the definitions of

the code, and in furtherance of it the conduct indulged in by respondents is expressly declared to be lawful by the Labor Code.

The right of respondents to publicize the dispute is very ably set forth in the case of **S. A. Clark L. Co. v. Cleveland, W. & D. Local No. 106** (Ohio), 154 N. E. 362:

> "**We take it that it will be conceded that the plaintiff company in the instant case had a legal right to reject the proposals of the union, and had the right to employ whom it desired to employ, at wages and under conditions of its own choice. But here its legal rights ended in respect to the matter in dispute.** It had no vested claim to the patronage of those whose interests were adversely affected by its actions, nor did it have any vested right to the patronage of any class of persons, or any person, who, knowing of the situation and of its rejection of the proposals of the defendants, did not wish to give it his business. **On the other hand, the defendants, by reason of their obligation to competitors who employed union labor, and for the protection of their members, had a legal right in a lawful way to influence and control the patronage of their members and of their friends in favor of themselves and those with whom they had contracts.** * * * The plaintiff, having determined to operate its business as a nonunion concern, and having refused to employ union labor, may not reasonably expect, nor has it the right to expect, the latter's business and support; and, furthermore, **it has no legal right to prevent a lawful publicity of its actions in this behalf by union labor.**
>
> "It is shown that the acts complained of are causing the plaintiff a substantial loss of its business and profits. This fact furnishes no basis for judicial interference, for the plaintiff had no vested property right in the business or lost by it. This is so for the reason that, while it had a legal right to determine

its course of action, it must be held to have considered in that connection the influence of union labor on the public and the benefit of its support and patronage. • • •"

To the same effect, **Exchange Bakery & Restaurant v. Rifkin**, supra.

Blumauer v. Local No. 159, 141 Ore. 399:

"This right of presenting its side of a controversy, organized labor may exercise by lawful means, in a lawful manner when its members have reasonable ground to apprehend that the practices or pay of any employer will produce an injurious effect on the working conditions of employees, generally, or of those in a particular trade or calling, **even though there may be no direct controversy between the employer and his immediate employees.**" See, also, **Goldfinger v. Feintuch**, 288 N. Y. S. 855; **Nann v. Raimist**, 255 N. Y. 307, 174 N. E. 690; **Stillwell Theater Co. v. Kaplan**, 259 N. Y. 405, 182 N. E. 63.

II

THE WISCONSIN LABOR CODE INCORPORATES INTO STATUTORY FORM THE PRINCIPLES WHICH HAVE ALWAYS BEEN THE RULE OF THE COMMON LAW IN THIS AND OTHER STATES. THE PRINCIPLE LEGALIZING CERTAIN PEACEFUL ACTS IN LABOR DISPUTES DOES NOT DEPRIVE APPELLANT OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW, NOR DOES IT DENY TO HIM THE EQUAL PROTECTION OF THE LAWS.

The Wisconsin Labor Code is more than a limitation on the power of courts to issue injunctions in labor disputes.

Such limitation on the jurisdiction of the courts results from an incorporation into the Wisconsin law of a substantive rule of law that has always prevailed in Wisconsin. The effect of such rule, both before the Wisconsin Labor Code was passed and since its passage, is not that the jurisdiction of the Court is limited, but that there has been nothing left for this jurisdiction to operate upon. It is to be noted that Section 103.53, Subsection 1, of the Wisconsin Labor Code, reads as follows:

> "103.53. Lawful conduct in labor disputes. (1) **The following acts, whether performed singly or in concert, shall be legal.**"

Then follows an enumeration of the acts which are declared to be lawful, such as peaceful picketing, patrolling, persuasion and advertising, etc. It is apparent that this then has become a rule of substantive law and not one directed merely to jurisdiction of the courts. We refer the Court to that part of the decision in the American Furniture Company case, 268 N. W. 250, set out in the appendix, wherein this proposition is discussed in connection with the appellant's assertion that the State Legislature had illegally limited jurisdiction of the state courts in contravention of the Wisconsin Constitution, Article I, Sections 1, 9 and 22, and Article VII, Sections 2 and 8:

> "The next contention is that the Wisconsin Labor Code, if construed to deny injunctive relief in such a situation as was here presented, is violative of secs. (1), (9) and (22) of Art. I, and secs. (2) and (8) of Art. VII of the Constitution of Wisconsin. Art. VII, sec. (2), vests the judicial power in this state both in matters in law and equity in the Supreme Court, Circuit Courts, etc. Sec. (8) of Art. VII confers original jurisdiction upon certain courts and confers upon them the power to issue writs of injunction necessary to

carry into effect their orders, judgments and decrees. Art. I, sec. (9), provides that every person is entitled to a certain remedy in the laws for all injury or wrongs which he may have received in his person, property, or character. The act is claimed invalidly to limit the equitable powers of the circuit court. It is not necessary to discuss here the undoubted limitations upon the power of the legislature to diminish the jurisdiction of the Circuit Court. It is beyond question that the legislature may change the substantive law and in doing so increase or reduce the subject matter upon which the jurisdiction of courts operate. It may enact a statute creating a crime or repeal such a statute. The first enactment does not increase nor does the latter diminish the jurisdiction of a court. It merely is an exercise of the power of the legislature to declare the public policy of the state and punish offenses against its sovereignty. Unless there is some other constitutional objection, such laws would not be invalid as interferences with the jurisdiction of the courts. When the legislature makes peaceful picketing valid under certain prescribed circumstances it leaves nothing for an injunction to operate upon. The provisions of such a law are substantive in character."

Thus it is apparent that the Wisconsin Labor Code does not "deny relief," as is asserted by the appellant. It makes certain acts in certain situations legal acts. One of those situations is one in which there is a "controversy concerning terms or conditions of employment • • • or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the proximate relation of employer and employee" (103.62, Wis. Stats.). This section of the statute has been construed to apply to the facts in the instant case. This construction was arrived at by taking

into consideration legislative intent and the arguments advanced in support of the Norris-La Guardia Act (as disclosed by the committee reports set out in the Appendix, pp. 39-117). It was found by the Wisconsin court in the case of American Furniture Co. v. I. B. of T. C. & H. A., 268 N. W. 250, that the express wording of the act "regardless of whether or not the disputants stand in the proximate relation of employer and employee" was meant to include the precise situation herein; that is, it is not necessary that the employees be employees of the particular employer involved. It is sufficient if both employer and the organization of employees are engaged in the same trade, craft or industry. This construction of the state act is not subject to attack here. The statute must be considered as it was so construed. **Hartford Accident & Indemnity Company v. N. O. Nelson Manufacturing Company**, 291 U. S. 352, 54 Sup. Ct. 392, 78 L. Ed. 840; **Ward & Gow v. Krinski**, 259 U. S. 503, 42 Sup. Ct. Rep. 529, 66 L. Ed. 1033. The appellant attacks the constitutionality of the Code so construed and presents that argument under three distinct points: (1) The Code deprives the appellant of property without due process of law; (2) the Code is a denial to the appellant of the equal protection of the laws; and (3) deprives the appellant of liberty and property without due process of law and equal protection of the law. The cases cited by the appellant deal with all three points, and therefore the points made by the appellant may be more logically discussed herein as one argument.

A.

While the Instant Case Was Decided on the Authority of the Construction of the Wisconsin Labor Code by the Supreme Court of the State of Wisconsin in the American Furniture Company Case, That Case Should Be Considered Only on the Rule of Construction Therein Decided and Must Be Distinguished on the Factual Basis.

We desire to call the Court's attention to the relationship of the American Furniture Company case to the case at bar. While the constitutionality of the Wisconsin Labor Code in the instant case is premised on the conclusions reached by the Wisconsin Court in the American Furniture Company case, supra, it is expressly acknowledged in the case at bar that the facts are to be distinguished from that case:

> "• • • It will readily appear that there are elements involved in this controversy not present in the case of **American Furniture Company v. I. B. of T. C. & H. of A. Chauffeurs, Teamsters and Helpers General Local No. 200 of Milwaukee** (Wis.), 268 N. W. 250, decided. The demand here by the unions is for the appellant to conform to a definite wage scale prevalent on union jobs and to conform to a fixed number of hours approved by the union. They also insist that he conform to the rules of apprenticeship and other working conditions prevalent on union jobs, and to conform to a fixed number of hours approved by the union. They also insist that he conform to the rules of apprenticeship and other working conditions prevalent in the industry where union rules prevail. The requirement that the employer personally refrain from working with the tools of the trade is important and vital to the craftsmen affiliated with defendant unions, because the practices sought to be prevented can so

readily affect wages and hours of labor. It is pointed out by respondent that the membership in the union has decreased during the depression years, and that as a necessary requisite for a proper existence and livelihood these craftsmen find it necessary to require employers to comply with the terms of article III. Appellant's method of conducting his business brings into the situation a direct attack by him upon the means relied upon by the unions to protect their scale of wages, hours and working conditions against the cutting of prices and lengthening of hours of work."

Appellant endeavors to attack the constitutionality of the Wisconsin Labor Code because of the application of the code to the factual circumstances in the American Furniture Company case. Appellant argues that in the case at bar no employee of his is a member of the respondent union and therefore the demands upon him by the respondent unions are not within the purview of the code, and if they are within the purview of the code as a labor dispute, such as is defined therein, the act as so construed is unconstitutional. This was the contention in the American Furniture Company case as applied to the facts of that case. Such contention was decided against the appellant in that case, and if that decision is correct it is equally applicable to the appellant's position in the case at bar. However, if such construction was incorrect in the American Furniture Company case, as applied to the facts in that case, it is not determinative of the correctness or incorrectness of such construction in its application to the facts in the present case. In the American Furniture Company case the employer claimed that he could not enter into a union contract because of the unanimous refusal of his employees to join the union. In the case at bar there is no such issue. The employees of the plaintiff, in so far as the record in this case is concerned, have made no objection to a union

status. The employer makes no contention that he cannot enter into the union contract because of the refusal of his employees to affiliate with the unions. On the contrary, he is willing to enter into the union contract providing the respondents will waive article III of the proposed agreement and permit him to work in competition with his union employees. Therefore, point III, relied upon by appellant in his brief to the effect that "Inasmuch as none of Senn's employees are members of appellee unions, and said unions represented none of his employees, the statutes, construed so as to deny Senn the right to relief from picketing and related activities by said unions, deprived him of liberty and property without due process and denied him the equal protection of the laws," is not applicable to the case at bar. The test of constitutionality, in so far as the Wisconsin Labor Code is concerned in the case at bar, must be tested on the basis of whether the appellant is deprived of his property without due process of law and denied the equal protection of the laws by virtue of the request made upon him to unionize his plant and comply with article III of the proposed agreement and article XX, section 6, of the union constitution, to wit, to abstain from working with the tools of the trade in competition with his union employees.

B.

The Wisconsin Labor Code, as Construed by the Court, Is a Valid Exercise of the Police Power of the States. It Does Not Deprive the Appellant of His Liberty or Property Without Due Process of Law.

(1) *United States Supreme Court cases discussed.*

It is axiomatic that when a state legislature passes certain laws in the legitimate exercise of the police power

of the state for the protection of the public health, safety and morals of the people of the state, those laws, even if they should limit to a certain extent the rights and liberties of some individuals, are not in violation of the Fourteenth Amendment to the Constitution. We do not care to burden the Court with an involved discussion of this academic proposition, since it has been presented to and determined by this Court on numerous occasions. Each case must be tested on its own particular facts. So we turn to the laws and cases applicable to the present situation.

Appellant places great reliance on the case of **Truax v. Corrigan**, 257 U. S. 312. We believe that the extended analysis of that case made by the Wisconsin court in the American Furniture Company case is an accurate statement of the true meaning and importance of that case and sufficiently demonstrates its inapplicability to the case at bar for the purpose of sustaining appellant's position, and that it is applicable to the case at bar in support of respondent's position:

> "That the act as so construed is unconstitutional is the next assertion made by the plaintiff. The first contention is that the act is invalid under the Fourteenth Amendment because it authorizes an unwarranted and unreasonable interference with the right of plaintiff to carry on its business and that of its employees to bargain collectively, that it denies plaintiff equal protection of the laws, and that it is not a legitimate exercise of the police power. Plaintiff's principal reliance is upon the case of Truax v. Corrigan, 257 U. S. 312.
>
> "In the **Truax case** plaintiffs owned a restaurant in the City of Bisbee, Arizona. The defendants were cooks and waiters formerly in plaintiff's employ, and

the labor union and trades' assembly of which they were members. In April, 1916, a dispute arose between plaintiffs and the union concerning terms and conditions of employment of members of the union employed by plaintiff. Plaintiff refused the demands of the union, and it ordered a strike of its members who were in plaintiff's employ. Thereafter defendants entered into a conspiracy and boycott to enforce the demands of the union. The method included picketing, displaying banners, advertising the strike denouncing plaintiffs as unfair to the union, **circulation of handbills containing abusive and libelous charges against plaintiffs and intimidations of injury to future patrons**. The State of Arizona had a statute with provisions substantially similar to those of the Clayton Act. It was argued that if these provisions made defendants' acts lawful, plaintiffs' rights under the Fourteenth Amendment were violated and the law void. The state courts dismissed the complaint. The state Supreme Court took the position that the gist of plaintiffs' charges was that defendants were merely inducing patrons to cease patronage by making public the fact of the dispute and the attitude of plaintiffs in it; that no man has a fixed property right in the esteem of the public; that while plaintiff had a right to refuse the demands of the union, the union had a right to advertise the cause of the strike; that picketing, if peacefully carried out for a lawful purpose, was not a violation of plaintiff's rights under the Arizona statute; and that while picketing was unlawful in Arizona prior to this act, plaintiffs had no vested right to have such a rule continue in that state. The Supreme Court of the United States held that under the statute as thus construed picketing may be exercised in any form without invading plaintiffs' rights, providing violence is not employed. The Court describes the method of picketing by defendants as follows: (1) having agents of the union walk back

and forth constantly during business hours displaying a banner announcing that the restaurant was unfair to cooks, waiters and their union; (2) having these agents attend at or near the entrance to the restaurant and announce the same matters in a loud tone of voice; (3) characterizing employees of plaintiff as scab Mexican labor and applying approbrious epithets to them in handbills circulated to would-be customers in front of the restaurant; (4) including in such handbills abusive and libelous attacks upon the senior member of plaintiffs' firm; (5) seeking to disparage food, service and prices and general conduct of plaintiffs' restaurant; (6) attacking the character of those who would patronize the restaurant; and (7) threatening those who disregarded the urging of the pickets and actually patronized plaintiffs' restaurant. The Court states the real question to be whether the means used were legal and concludes that they were not, and that the defendants' acts constituted palpable wrongs. The Court states:

> "'It was not unlawful persuasion or inducing. It was not a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage. • • • It was moral coercion by illegal annoyance and obstruction and it thus was plainly a conspiracy.'

"It was held that an act which operates to make lawful such a wrong deprives the owner of the business of property without due process and is void under the Fourteenth Amendment. In reply to the contention that this was a proper exercise of the police power and that property rights must yield to such power reasonably exercised, the Court says:

> "'The broad distinction between one's right to protection against a direct injury to one's fundamental property right by another who has no

special relation to him and one's liability to another with whom he establishes a voluntary relation under a statute is manifest upon its statement.'

"It is pointed out that this is not a mere case of a peaceful secondary boycott as to the illegality of which courts have differed. Here the illegality of the means was without doubt and fundamental. The means used were libelous and abusive attacks on the plaintiffs' reputation like attacks on their employees and customers, threats of such attacks on would-be customers, picketing and patrolling of the entrance to their place of business, and the consequent obstruction of free access thereto—all with the purpose of depriving the plaintiffs of their business. To permit these definitely illegal acts and to decline to give a remedy effective against them would be to deny and disregard fundamental rights of liberty and property. Under the Constitution of Arizona the plaintiffs would have had the right to an injunction. If defendants' acts had been done as the result of any other controversy than a labor dispute, an injunction would necessarily have issued. To deny it in this case would be to deny equal protection of the laws.

"It seems to us that this case is not applicable to the present situation. As we read the case, it is held that with respect to acts constituting libel, slander, intimidation, threats, breaches of the peace or threatened breaches of the peace, which are recognized as definitely illegal, statutory immunity from legal redress cannot validly be conferred upon the labor unions, and the legislature must retain and give effect to all legal and equitable remedies created by the Constitution for the enforcement of rights and the redress of wrongs. See 13 N. Y. U. L. Q. Rev. 92 at 96. It is not apparent to us, however, that the legislature may not recognize the peculiar status of labor organizations in labor disputes because of the

self-interest of the union and its members and the assumed necessity for protective group action and confer an immunity with respect to acts involving none of these wrongful features whether they take the form of picketing or not. There is no substantial question of classification. To hold that there was would put into the question the validity of both the Clayton Act, the Norris-La Guardia Act and the Wisconsin Labor Code, no matter how these acts are construed.

"The question is whether the legislature may declare lawful acts on the part of workingmen or groups of them that in its judgment are necessary in order to give labor an economic weapon which tends to balance the capacity for economic duress which past conditions have created in the employer. We discover no constitutional provisions which denies this power to the legislature. The evils which may and do flow from the natural bargaining advantage held by the employer may be recognized as calling for legislative correction and conceivably may be met in a variety of ways. It has here been met by equalizing the bargaining power of labor and leaving the determination of wages and working conditions to the play of economic forces. **We cannot say that the legislature may not validly permit acts on the part of labor organizations not intrinsically wrongful as involving violence, intimidation, or misrepresentation, the purpose of which is to give notoriety to the attitude of the employer in a labor dispute. That the philosophy underlying such immunities is that the worker should have some economic advantage to balance that theretofore held by the employer and arising out of the control of jobs, is not a sufficient reason for denial of the legislative power, or for the conclusion that the exercise of this power results in the impairment of the constitutional rights of the employer. If it is, then the act cannot be sustained on any construction.**

The presence of a few union members in plaintiff's employ or the existence of a dispute between plaintiff and its employees would not be a circumstance sufficient to validate immunities extended to those not in plaintiff's employment, if these immunities were intrinsically beyond the power of the legislature to confer. Assuming a dispute between employer and employee, the only justification for extending the provisions of the code to outside organizations is their general self-interest in procuring satisfactory working and bargaining conditions in the craft or industry represented, and this interest exists whether the employees are in dispute with their employers or not. We conclude that the act as we construe it does not deny to plaintiff due process or equal protection of the laws and is a valid exercise of legislative power so far as this objection is concerned. Whether such laws constitute a wise solution may, of course, be fairly put in question, but the forum for such a controversy is the legislature and not the courts. The question is irrelevant here, and we cannot resist the conclusion that one of the purposes of the labor code was to make it so and to substitute a legislative declaration of policy for the varying standards and view theretofore expressed in judicial opinions." (Emphasis ours.)

Likewise in the case of **Fenske Brothers v. Upholsterers International Union**, 358 Ill. 239, 193 N. E. 112, 97 A. L. R. 1318, the Illinois Supreme Court, in discussing the validity of the Illinois Anti-injunction Act, held such act to be constitutional. In the course of its opinion the Illinois Court distinguishes **Truax v. Corrigan**, supra, in this way:

> "In **Truax v. Corrigan**, 257 U. S. 312, 42 S. Ct. 124, 126, 66 L. Ed. 254, 27 A. L. R. 375, which is largely relied upon by appellees, an Arizona law similar to the statute in controversy, was held to contravene the

due process and equal rights clauses of the Federal Constitution. In that case Truax and others, who operated a restaurant, refused to accede to the demands of the union concerning the terms and conditions of employment of certain cooks and waiters, and a strike was called. A conspiracy and boycott to injure the proprietors in their business by inducing customers and other favorably disposed persons to cease patronizing them were entered into. The methods used included picketing, displaying banners advertising the strike, denouncing the proprietors as 'unfair' to the union, appealing to customers to stay away, and the circulation of handbills containing abusive and libelous charges against the employers, their employees and patrons, with intimations of injury to future patrons. A complaint for an injunction was filed reciting the facts. The business was injured and a showing of irreparable damages was made. The Arizona Supreme Court (20 Ariz. 7, 176 P. 570) affirmed an order of the trial court sustaining a demurrer and dismissing the complaint. The cause reached the Supreme Court of the United States upon the writ of error. An examination of the opinion discloses that it is based, not upon the provisions of the Arizona act, but upon its effect as construed by the Supreme Court of that state. The Arizona Court held that plaintiffs did not claim defendants had by violent means invaded their rights, and that, if that kind of picketing were charged and established by proof, plaintiffs would be entitled to relief to the extent of prohibiting violence in any form. In the opinion of the United States Supreme Court, Mr. Chief Justice Taft said: 'The effect of this ruling is that, under the statute, loss may be inflicted upon the plaintiffs' property and business by "picketing" in any form if violence be not used, and that because no violence was shown or claimed, the campaign carried on, as described in the complaint and exhibits, did not unlaw-

fully invade complainants' rights. The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiffs' legal rights under the Fourteenth Amendment, we are at as full liberty to consider them as was the State Supreme Court. • • • The only respect in such a case in which this Court is bound by the judgment of the State Supreme Court is in the construction which that court puts upon the statute. • • • The real question here is: Were the means used illegal? The above recital of what the defendants did can leave no doubt of that.' After a brief resume of the acts committed, including the 'threats of injurious consequences to future customers,' all linked together in a campaign, the Court held they were not lawful persuasion or inducing, and that violence could not have been more effective. Upon this basis it was held that the Arizona statute, as construed by the Supreme Court of that state, violated the due process and equal rights clauses of the Federal Constitution. **Plainly there was no intention on the part of the United States Supreme Court to hold the statute invalid because of its provisions as to peaceful picketing. Those provisions as a test of invalidity were not in any way applied.**" (Emphasis ours.) (Certiorari denied 79 U. S. L. Ed. 1682, 55 Sup. Ct. 645).

Summarizing briefly, the Truax decision rested upon two propositions: (1) The acts alleged in the complaint and admitted by demurrer were acts which were tortious in and of themselves—their tortious character lay not in the purposes toward which they were directed, and (2) since those acts were tortious it was held that to deprive the employer of a remedy by injunction against such tortious acts was to deprive the employer of equal protection of the laws, and to deprive him of his property without due process of law. The United States Supreme Court held

that where certain actions were tortious per se, it would be a violation of the Fourteenth Amendment and not a valid exercise of the state police power to deny to the complainants their right of remedy by injunction. **The Court did not hold, however, that where labor disputes are involved, an act restricting the power of courts to issue injunctions against peaceful acts was an unconstitutional deprivation of property, or a denial of equal protection of the laws.**

In the instant case, after a trial on the merits, the Court found that the only tortious acts consisted of a proposed secondary boybott, which the defendants, through their counsel, agreed to withdraw and to cease further activities in that direction. Since the act requires that the Court shall be satisfied that the unlawful acts complained of "will be executed or continued unless restrained" (Sec. 103.56, Wis. Stats.), the Court both under the act and under the general principles of equity being satisfied that such acts will not be continued, did not issue an injunction. This ruling of the trial court was affirmed by the court of last resort in Wisconsin, Justice Fairchild saying:

> "It appears when issue was first joined between the parties, considerable spirit was manifested on both sides, and evidently acts occurred calculated to intimidate appellant and bring about a secondary boycott. The trial court said:
>
> " 'That because of their statements made by their counsel in open court and in their presence, that they will not send any more letters to owners, contractors or architects, as hereinbefore referred to, and will not indulge in any of the acts or conduct referred to in said letters, the Court concludes that no unlawful act will be committed or will be executed or continued';
>
> "The discretion of the trial court in determining that there is no occasion for a restraining order in the

particular suggested is well within the scope of duties imposed on it. We are of the opinion that no occasion exists for overruling the lower court in this particular, and in other respects the judgment is approved."

Also, in the case of **United Chain Theatres v. Philadelphia M. P. M. O. Union**, 50 Fed. (2d) 189, in referring to the issuance of an injunction against certain acts, which acts counsel for the defendants advised the Court would not be continued, the Court said:

> "Specifically, in the regard to the matter just referred to, my finding is that the conduct criticized has been discontinued, and there is no reason to apprehend that it will be resumed."

It is apparent that the **Truax case** does not go to the proposition here involved, and that the **Truax case** is really in support of respondent's contention that where the acts complained of are peaceful and without violence or intimidation and for the purposes sought to be accomplished such acts are in furtherance of the legitimate purposes and objects for which working men organize. A failure to deny relief by way of injunction is not in violation of the Fourteenth Amendment of the United States Constitution. The appellant has also relied upon **Coppage v. Kansas**, 236 U. S. 1, 59 L. Ed. 441; **Truax v. Raich**, 239 U. S. 33, 60 L. Ed. 131; **Hitchman Coal & Coke Company v. Mitchell**, 245 U. S. 229, 62 L. Ed. 260, and **Adair v. U. S.**, 208 U. S. 161, 52 L. Ed. 436. The **Hitchman case**, supra, has already been disposed of by this Court in the case of **American Steel Foundries Company v. Tri-City Central Trades Council**, 257 U. S. 184, wherein it was said:

> **"The unlawful and deceitful means used were quite enough to sustain the decision of the Court without**

more. The statement of the purpose of the claim is sufficient to show the remoteness of the benefit ultimately to be derived by the members of the International Union from its success and the formidable country wide and dangerous character of the control of interstate commerce sought. The circumstances of the case make it no authority for the contention here."

The **Coppage case**, supra, relied upon by the appellant, is one involving a state statute which imposed criminal penalties on employers and did not involve anti-injunction statutes patterned after the Norris-La Guardia Act. As was stated in the case of **Starr v. Laundry and Dry Cleaning Workers**, supra:

"The **Coppage case** construes laws making it a criminal offense for an employer to enter into a contract with an employee containing a clause to the effect that the employee will refrain from joining a labor union during the term of his employment. The question of striking by employees is not involved. Neither is the question of picketing, nor the propriety or legality of the statutory provisions prescribing procedure in cases wherein injunctive relief is sought. To attempt to impute criminality to an act that is sanctioned by the Constitution is obviously different from prescribing a special procedure to be followed to obtain injunctive relief in a special class of cases."

It must also be noted that in the case of **Texas & N. O. R. Co. v. Brotherhood of Railway Clerks**, 281 U. S. 548, 74 L. Ed. 1035, both the Adair and Coppage cases were rejected by a unanimous court, and Chief Justice Hughes, speaking for the court, rendered innocuous those decisions. Among other things, the Court said:

"Exercising this authority, Congress may facilitate

amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation. In shaping this legislation to this end, Congress was entitled to take cognizance of actual conditions and to address itself to practical measures. **The legality of collective action on the part of employes to safeguard their proper interests is not to be disputed.** It has long been recognized that employes are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. • • • Congress was not required to ignore this right of the employes but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than strife. • • •"

We have discussed the case of **Duplex Printing Press Co. v. Deering**, 254 U. S. 443, and the case of **American Steel Foundries Company v. Tri-City Central Trades Council**, 257 U. S. 184, in the briefs submitted herewith on the question of jurisdiction. We wish only to call to the Court's attention at this time the decision by this Court in the **Tri-City case.** We notice that counsel for appellant has assiduously avoided that decision in his brief. We believe that that decision effectively sets at rest the constitutional question raised by the appellant in this appeal. We quote the following:

"The object and problem of Congress in Section 20, and indeed of courts of equity before its enactment, was to reconcile the rights of the employer in his business and in the access of his employees to his place of business and egress therefrom without intimidation or obstruction, on the one hand, and the right of the employees, **recent** or expectant, to use peaceable and lawful means to induce present employees and would-be employees to join their ranks, on the other. • • •

"Is interference of a labor organization by persuasion and appeal to induce a strike against low wages under such circumstances without lawful excuse and malicious? We think not. Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers an opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. **The right to combine for such a lawful purpose has in many years not been denied by this court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild.** It is impossible to hold such persuasion and propaganda without more, to be without

> excuse and malicious. The principle of the unlawfulness of maliciously enticing laborers still remains and action may be maintained therefor in proper cases, but to make it applicable to local labor unions, in such a case as this, seems to us to be unreasonable." (Emphasis ours.)

And we also refer the Court to the fact that both the **Hitchman** and **Duplex cases** are distinguished in the Tri-City case.

(2) *Discussion of state court and lower federal court cases sustaining constitutionality of the act as construed.*

The constitutionality of the Norris-La Guardia Act and the state anti-injunction acts, which are patterned after the Norris-La Guardia Act, has been raised and decided in the lower state and federal courts. In the federal courts, the constitutionality of the Norris-La Guardia Act has been sustained in the cases of **United Electric Coal Company v. Rice**, 80 Fed. (2d) 1 (C. C. A. 7th) Cert. denied 297 U. S. 714, 80 L. Ed. 1000); **Levering & Garrigues v. Morrin**, 71 Fed. (2d) 284 (C. C. A. 2d) (Cert. denied 293 U. S. 595, 79 L. Ed. 688); **Miller Parlor Furniture Company v. Furniture W. I. Union** (N. J.), 8 Fed. Supp. 209; **Cinderella Theatre Company v. Sign Writers Local Union** (Mich.), 6 Fed. Supp. 164; **Dean v. Mayo** (La.), 8 Fed. Supp. 73.

In the **Levering, Miller, Cinderella** and **Dean cases** (supra), the act was construed, as was the act in the instant case, to apply to situations wherein there was a controversy between an employer and members of a labor union engaged in the same trade, craft or industry as the employer, but who are not employees of such employer. In all these cases the contention now made by the appellant in the instant case was decided adversely to such con-

tention, and the federal courts concluded that not only was the Federal Act applicable to such situation, but that when applied to such situation it was not unconstitutional. In the state courts, the constitutionality of the state anti-injunction acts was raised in the following cases and with specific reference to the Fourteenth Amendment of the United States Constitution:

Fenske v. Upholsterers International Union, 358 Ill. 239, 193 N. E. 112 (Cert. denied), 79 U. S. L. Ed. 1682, 55 Sup. Ct. 645;

Dehan v. Hotel & Restaurant Employees Union (La.), 159 So. 637;

Aberdeen Restaurant Corporation v. Gottfried, 285 N. Y. Supp. 832;

Starr v. Laundry & Dry Cleaning Workers Union (Ore.) (not yet officially reported), 63 Pac. (2d) 1104;

Wallace v. International Association of Mechanics (a companion case to **Starr v. Laundry & Dry Cleaning Workers Union**, supra) (not yet officially reported), 63 Pac. (2d);

American Furniture Company v. I. B. of T. C. and H. of A. Chauffeurs, Teamsters and Helpers General Local No. 209 of Milwaukee (not yet officially reported), 268 N. W. 250, set out in the appendix at pages 1 to 28).

In the **American Furniture Company case**, supra, and the **Wallace case**, supra, the code was applied to a situation wherein none of the employees of the employer were members of the defendant unions. We have already discussed the American Furniture Company case. In the case of **Wallace v. International Association of Mechanics** the constitutionality of the act on federal constitutional grounds is upheld as against the contention made by the

appellant in the instant case. Since this case is the most recent one on the subject, we take the liberty of quoting from it at some length:

"After the decision in the **Duplex** case was tendered, injunctions in labor controversies seemed to be the order of the day. Many disinterested persons were highly critical of the courts because of such intervention. Congress was besieged with various bills seeking to restrict the power of courts to issue injunctions in cases involving dynamic social and economic problems. In the great economic struggle between capital and labor, the decided trend of public opinion seemed to be towards the conviction that labor is entitled, through the medium of collective bargaining, to a greater recognition of its rights and that legislation should be enacted further to foster the welfare and interests of the wage-earner. This crystallization of public opinion in favor of the man who earns his livelihood by the sweat of his brow culminated in the passage of the Norris-La Guardia Act. See: **The Labor Injunction** by Frankfurter and Greene. Also Oakes on **Organized Labor and Industrial Conflicts**; 84 Pa. Law Review 771; 30 Mich. Law Review 1257; 16 Minn. Law Review 639.

"The enactment of the Norris-La Guardia Act and laws patterned after it undoubtedly marks the dawn of a new era in the domain of labor injunctions. Whether such legislation is in the best interests of the commonwealth is a legislative and not a judicial question. The function of the court is to declare the law as it is and not what it thinks it ought to be. Of course, if the act is clearly unconstitutional, the court should not hesitate so to declare; but, if not invalid, the act should be given full force and effect and not be whittled away by judicial construction. Too often drastic laws are passed with the apparent expectation that when litigation arises out of their application courts will so construe them, in the face

of plain and explicit language to the contrary, that no hardship will result. Needless to say, under our constitutional system of government, such is not the function of the judiciary.

"The right of labor to organize and to engage in collective bargaining is now universally recognized. How far a labor organization may go in the furtherance of its interests is a matter, however, upon which courts disagree. To attain their objectives such organizations at times resort to the strike and picketing. A few courts still look upon picketing as wrongful per se and an unlawful interference with the right of the employer to transact business. They hold, in effect, that there can be no such thing as lawful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching. The great majority of courts, including the United States Supreme Court (**American Steel Foundries v. Tri-City Central Trades Council**, 257 U. S. 184, 66 L. Ed. 189, 42 S. Ct. 72, 27 A. L. R. 360), however, sustain the right of peaceful picketing. The doctrine that picketing is necessarily a species of coercion and intimidation is dogma long since discarded (**Exchange Bakery & Restaurant, Inc., v. Rifkin**, 245 N. Y. 260, 157 N. E. 130; **Goldfinger v. Feintuch**, 288 N. Y. S. 855). If merely peaceful picketing were in and of itself coercion, there could never be peaceful picketing in any case, for coercion is never lawful. As stated in **Bayonne Textile Corp. v. American Federation of Silk Workers**, 116 N. J. Eq. 146, 172 Atl. 551, 92 A. L. R. 1450:

> "'The modern view is that picketing is not per se unlawful and should not be enjoined if peacefully carried on for a lawful purpose.'

"This court has long recognized the right of peaceful picketing when done for a lawful purpose. **Blumauer v. Portland M. F. M. O. P. Union**, 141 Or. 399, 17 P. (2d) 1115; **Moreland Theatres Corporation v.**

M. P. Union, 140 Or. 34, 12 P. (2d) 333; **Crouch v. Central Labor Council,** 134 Or. 612, 293 P. 729; **Greenfield v. Central Labor Council,** 104 Or. 236, 192 P. 783, 207 P. 168. It is an appeal to the public and to members of the union not to patronize an employer who does not conform to the standards of organized labor relative to wages, hours and conditions of employment. The mere fact that an employer may sustain loss of business as a result of such picketing does not warrant intervention. It is *damnum absque injuria.* No person has a vested right to the patronage of those who are not in accord with his standards of employment. **United Chain Theatres v. Philadelphia M. P. M. O. Union,** 50 F. (2d) 189; **S. A. Clark Lunch Co. v. Cleveland Waiters & Beverage Dispensers Local,** 22 Ohio App. 265, 154 N. E. 362. Such loss, under our social and economic system, is merely the result of a conflict of interests between capital and labor. What has been said thus far is on the assumption that violence, intimidation and coercion are foreign to peaceful picketing. No court has ever upheld the right to injure or destroy a business through a tortious act.

"We agree fully with the contention of the plaintiffs that there must be a reasonable justification for picketing. There must be an actual bona fide dispute. Picketing must be peacefully carried on and it must be for a lawful purpose. When the purpose of picketing is to injure or destroy a business rather than to further the common interests of the worker, it is an unlawful interference with the property rights of the employer and should be enjoined. **Blumauer v. Portland M. F. M. O. P. Union,** supra.

"The decisions of this court are not clear as to whether there can be picketing in the absence of a strike. **Moreland Theatres Corporation v. M. P. Union,** supra; **Greenfield v. Central Labor Council,** supra. Without any attempt to reconcile all that has been

said on the subject, we think the **better reasoned cases are to the effect that a strike and picketing are not necessarily concomitant. There may be a strike without picketing and picketing without a strike.** Each is a combative weapon which labor may use to accomplish its objectives if the same be lawful. The mere fact, therefore, that no strike existed, so far as the Chevrolet Company and Wentworth & Irwin are concerned, does not in itself preclude the defendants from picketing the plaintiffs' places of business. **Exchange Bakery v. Rifkin**, supra.

"Having expressed our views relative to the law applicable to picketing, we come to the vital question: Do the facts disclose a labor dispute within the meaning of the statute? We are convinced that the Norris-La Guardia Act—after which our statute was patterned—was designed to overcome the interpretation given to the Clayton Act by the United States Supreme Court in **Duplex Printing Press Co. v. Deering**, supra. The Senate and House Committee reports so indicate: Senate Report No. 163, 72d Congress (1932); H. R. Report No. 669, 72d Congress. **If the Norris-La Guardia Act does not place greater restrictions upon the power of courts to issue injunctions in industrial controversies, the enactment of the law—aside from its provisions relative to 'Yellow Dog Contracts'—was indeed vain and idle.**

"Clearly one of the principal purposes of the act was to protect labor from the abuses of unrestrained issuance of injunctions in industrial controversies. The act is a plain mandate to the courts not to grant equitable relief in labor disputes, unless fraud, violence or intimidation is involved. To relieve any doubt as to what constitutes a labor dispute, the legislature not only defined the same under subdivision 3 of section 13 of the act, but also provided in the preceding subdivision of the same section what person or association shall be deemed to have participated

in such dispute. The definition of a labor dispute is so broad and comprehensive that it undoubtedly extends the scope of the Clayton Act as interpreted by the United States Supreme Court by placing a greater restriction upon courts in the matter of issuing injunctions. We are convinced that the immunity from injunctions clearly extends to disputes between persons engaged in the same industry or craft who have a 'direct or indirect' interest therein, and is not limited to disputes between an employer and his immediate employees. The act provides that an association of employees has an interest in a labor dispute, **'regardless of whether or not the disputants stand in the proximate relation of employer and employee.'** If there were any doubt as to the intention of Congress in enacting the Norris-La Guardia Act it ought to be removed by the following language of the report of the House Committee on the Judiciary, favoring the passage of the bill:

> " 'Section 13 contains definitions which speak for themselves. It is hardly necessary to discuss them other than to say that these definitions include, as hereinabove stated, a definition of a person participating in a labor dispute which is broad enough to include others than the immediate disputants and thereby corrects the law as announced in the case of **Duplex Printing Co. v. Deering**, supra, wherein the Supreme Court reversed the circuit court of appeals and held that the inhibition of section 20 of the Clayton Act only related to those occupying the position of employer or employee and no others.'

"Also note the following language of the Senate Committee on the Judiciary:

> " 'Section 13 of the bill defines various terms used in the act, and it is not believed that any criticism has been or will be made to these definitions.

" 'The main purpose of these definitions is to provide for limiting the injunctive powers of the Federal courts only in the special type of cases, commonly called labor disputes, in which these powers have been notoriously extended beyond the mere exercise of civil authority and wherein the courts have been converted into policing agencies devoted in the guise of preserving peace, to the purpose of aiding employers to coerce employees into accepting terms and conditions of employment desired by employers.

" 'The proposed bill is designed primarily as a practical means of remedying existing evils and limitations are imposed upon the courts in that class of cases wherein these evils have grown up and become intolerable. This is a reasonable exercise of legislative power, and in order that the limitation may not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes, the bill undertakes specifically to designate those persons who are entitled to invoke the protection of the procedure required.'

"To restrict the act to controversies between employer and employee would run counter to the plain intent of the legislature and would undoubtedly defeat the very purpose of labor organizations having as objectives improved standards in wages, hours and conditions of labor. In considering the Clayton Act, Mr. Chief Justice Taft, speaking for the court in **American Foundries v. Tri-City Trades Council**, supra, said:

" 'The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination

extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious.'

"Is it probable that the court would depart from such reasoning upon a consideration of the clear and explicit provisions of the Norris-La Guardia Act?

"The mere fact that the employees are not complaining against the terms and conditions of employment under which they are working is not conclusive. In many instances where sweatshop conditions prevail—although not in the instant cases—the employee, through the greed and avarice of capital, is bound down in abject physical and mental slavery. It is idle to talk about the protest of the individual laborer under such conditions. How can an employee exercise freedom of thought and expression when hungry children are dependent upon him for support? Protest against terms and conditions of employment with some employers simply means that the wage earner goes home without a job. It is through concerted action and collective bargaining that the laborer hopes for some semblance of economic freedom.

"On the other hand, the court is not unmindful that organized labor has, in some instances, assumed a domineering and dictatorial attitude inimical not only to the best interests of labor but to general public. It is only when capital and labor have due regard for the rights of each other that a wholesome condition exists. When selfishness and greed prevail, the innocent public in most instances suffers most. To devise

more efficient and expeditious methods for the adjustment of differences in these industrial controversies has ever been a vexatious problem for the legislative branch of the government and, like Banquo's ghost, it will not down. Whatever may be the best solution of the problem, we are convinced it is not through government by injunction.

"That the act in question is not confined merely to a labor dispute between an employer and his immediate employees, see: **Levering & Garrigues Co. v. Morrin**, decided in 1934, 71 F. (2d) 284, certiorari denied in 293 U. S. 595; **Dehan v. Hotel and Restaurant Employees etc. Local Union** (La.), decided in 1935, 159 So. 637; **Cinderella Theatre Co. v. Sign Writers' Local Union** (Dist. Court, Mich.), 6 F. Supp. 164; **American Furniture Co. v. I. B. of T. C. and H. of A.** (Wis.), decided in 1936, 268 N. W. 250; **Fenske Bros. v. Upholsterers' Int. Union**, 358 Ill. 239, 193 N. E. 112, 97 A. L. R. 1318; **Miller Parlor Furniture Co. v. Furniture Workers' Industrial Union**, decided in 1934 (Dist. Court, N. J.), 8 Fed. Supp. 209; **Scofes v. Helmar**, 205 Ind. 596, 187 N. E. 662; **Wisconsin State Federation v. Simplex Shoe Mfg. Co.**, 215 Wis. 623, 256 N. W. 56; **Goldfinger v. Feintuch**, decided June 11, 1936, 288 N. Y. S. 855; **Exchange Bakery Co. v. Rifkin**, supra; **Mann v. Raimist**, 255 N. Y. 307, 174 N. E. 690, 73 A. L. R. 669; **Stillwell Theatre v. Kaplan**, 259 N. Y. 405, 182 N. E. 63, 84 A. L. R. 6.

"It is true that the last three cases above cited did not involve legislation patterned after the federal act, but the reasoning in all of them strongly supports the construction which we have given to the statute in question.

"The statutory definition of a 'labor dispute' (subdivision 3, section 13, chapter 355, Oregon Laws 1933) is broad enough to include any controversy relating to conditions of employment or industrial relations **regardless of whether or not the disputants stand in the proximate relation of employer and employee.**

Notwithstanding the plain and specific language of the statute, it is argued, however, that the above emphasized clause was merely intended to permit a labor union to come to the aid of its members or at the most workmen who are engaged in a labor dispute. In answering this contention the Supreme Court of Wisconsin in **American Furniture Co. v. I. B. of T. C.**, supra, said:

> "'It is the **disputants** who need not stand in the relation of employer and employee. Plaintiff's contention implies that basically the disputants must be the employer and the employees, whereas the act plainly indicates that the disputants, that is to say, the principals to a labor dispute, need not stand in the relation of employer and employee.'

"Under the construction as contended for by plaintiffs a labor union would absolutely be prohibited from protesting against low wages, long hours, or unsanitary conditions of a sweatshop, because, peradventure, non-union employees were 'satisfied' to continue to work under such conditions. Can it reasonably be contended that a labor union has no interest in such industrial relations? Are we to so construe the statute that an organization of workmen united for the purpose of raising the standards of labor must stand idly by and see its cause undermined and defeated merely because there is no immediate dispute between employer and employee?

"In **United Electric Coal Companies v. Rice**, 80 F. (2d) 1, language may be found tending to support the contention of respondents herein, but that case involved a controversy between two labor unions. It was not a controversy over hours, wages, or labor conditions, as in the instant case. Hence it is not applicable. The same may be said in reference to **Lauf v. Shinner & Co.**, 82 F. (2d) 68.

"Defendants also urge that the decision of this

court sitting in banc in **Blumauer v. Portland M. P. M. O. P. Union**, supra, requires a reversal of the decrees enjoining picketing in the instant cases. In the **Blumauer case**, a moving picture business was operated under a lease by G. M. Dunn, Inc. The employer reduced the wages of certain moving picture operators below the wage scale of the union. The employees refused to accept such wage reduction and quit their employment. Non-union operators were secured to carry on the work. The union thereupon picketed the place of business as being 'Unfair to Organized Labor.' The lessee became financially involved and the lessor took over the theatre and continued operation. Picketing continued. Thereupon suit for injunction was instituted.

"In that case, as here, the plaintiff asserted the object and purpose of the picketing was to compel recognition of the union. The defendant labor organization contended that the purpose was 'to make appellants pay the union scale of wages regardless of whom they may hire.' The union, there as here, offered to withdraw the pickets if the employer would comply with the union scale of wages. Chief Justice Campbell, speaking for the court in an opinion from which there was no dissent—the personnel of the court being the same as now exists—said:

> " 'Organized labor has a right to lawfully use all lawful means to bring about reasonably desirable terms and conditions in the way of hours, pay or other conditions of employment. Organized labor has the right to present its side of a controversy to the public by all lawful means if such means may be, and are, used in a lawful manner without violence, or threats, or intimidation of the employer, his employees or the patrons of the employer's business.
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> " 'This right of presenting its side of a contro-

versy, organized labor may exercise by lawful means, in a lawful manner **when its members have reasonable grounds to apprehend that the practices or pay of any employer will produce an injurious effect on the working conditions of employees generally, or of those in a particular trade or calling, even though there may be no direct controversy between the employer and his immediate employees.'**

"It is true that this decision was rendered a few months prior to the enactment of the statute under consideration and it may well be argued that, in some particulars, it cannot be reconciled with prior decisions of this court. It is, nevertheless, the last expression of this court on the subject of the labor injunction and is supported by reputable authority. **Exchange Bakery Co. v. Rifkin**, supra. Certainly if the **Blumauer** decision was good law at the time it was rendered, it is doubly so now, in view of the public policy of the state as declared in chapter 355, Oregon Laws for 1933. It will be recalled that in the **Blumauer** case no member of the union was an employee of the plaintiff seeking injunctive relief at the time picketing was carried on.

"In our opinion, the statute thus construed is applicable. The defendants have 'direct or indirect' interests in the terms and conditions of employment regardless of whether or not they 'stand in the proximate relation of employer and employee.' By reason of the difference between the standards maintained by the plaintiffs and those fixed by the defendants, a 'labor dispute,' within the meaning of the statute, exists. It is not for this court to say who is right in this industrial controversy. The court is not prepared to say that the standards advocated by the defendant are so unreasonable as to indicate a purpose to injure the plaintiffs rather than to promote the interests of the labor organization. It is a ques-

tion upon which reasonable minds might differ. Under such circumstances the policy of the state, as expressed in the act, is non-interference in this conflict of interests, so long as neither side resorts to unlawful methods in seeking its objective. It may be that the statute, in its application to the plaintiff employers, operates harshly, but the matter rests with the legislature and not with the court."

C.

The Wisconsin Labor Code Does Not Deny to the Appellant or Others the Equal Protection of the Laws Within the Meaning of the Fourteenth Amendment of the Constitution of the United States.

While this problem of the equal protection of the laws is almost inextricably tied up with the question of due process of law, we treat it separately, since the appellant has seen fit to do so. The cases already cited and discussed deal with this problem along with the other problems in the case. The case of **Truax v. Corrigan**, which is so greatly relied upon by the appellant, we have already discussed and explained. It is clear that it has no application here. We must also point out in this connection that the appellant calls into question other provisions of the Labor Code to demonstrate this point. While we believe that this argument cannot be sustained on any point, we reiterate that those parts of the Labor Code are not now here pertinent nor are they provisions which the Court now has before it for its review.

We believe that the decision of the Court in the case of **Texas & N. O. Railroad Company v. Brotherhood of Railway Clerks**, supra, has determined this question in so far as legislation concerning disputes arising out of con-

troversies between employers and employees is concerned.

It is not "class legislation" for a legislature to enact laws having particular and specific application only to the class of persons who labor with their hands. From time immemorial, both in old England and in this country, the working class of people have been treated separately. From a time preceding the Magna Charta, where the expressions "due process of law" and "equal protection of the laws" got their first articulate enunciation, people who work with their hands have been treated as a separate class, both from the standpoint of restrictive legislation and from the standpoint of what at first blush appears to be legislating special privileges. For the last one hundred years, both in this country and in England, the legislatures have been enacting laws affecting the laboring class, specifically and exclusively. As stated recently in the New York case of **Kronowitz v. Schlansky**, 282 N. Y. S. 564, a case involving the validity of a statute granting a jury trial in contempt proceedings arising out of labor disputes:

> "It is urged, finally, that the statute considered is unconstitutional as special class legislation which denies the plaintiff equal protection of the laws. As was said in People v. Beakes Dairy Co. (222 N. Y. 416, 429), 'There is no constitutional prohibition against class legislation as such if the classification is based on some reasonable ground, and is not essentially arbitrary. The statutes are replete with instances where the legislature has selected a class of persons for regulation. It is only where there is no real distinction on a substantial basis that it can be said that the equal protection of the laws is denied.'
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> "**The social and economic forces underlying labor**

disputes with its resulting wide public interest, the plethora of legal research on the subject, the declaration of various legislatures, including the Congress of the United States and the legislature of this state, that there are abuses to be met in the existing procedure applicable to labor disputes, all negative any possible inference that legislation limited in its application to labor disputes is arbitrary, oppressive or capricious are based upon no real distinction." (Emphasis ours.)

The following are a few examples of legislation affecting only laboring people that have been upheld against the contention of "class legislation": In **Holden v. Hardy**, 169 U. S. 366, a state statute was upheld limiting the hours of employment in mines and smelters; in **Knoxville etc. Co. v. Harbison**, 183 U. S. 13, a statute requiring redemption in cash of store orders or other evidences of indebtedness, issued in payment of wages, was held constitutional; in **Patterson v. Bark Eudora**, 190 U. S. 169, a Congressional statute forbidding advance payment to seamen was upheld; in **McLean v. Arkansas**, 211 U. S. 539, the prohibition of contractors to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine was held constitutional; in **Bunting v. Oregon**, 243 U. S. 426, a statute limiting the hours of employment in a manufacturing establishment with a specified allowance for overtime payment was upheld. In addition to the examples cited, we have such familiar examples as the employers' liability acts, workmen's compensation laws and the seamen's act of 1920, all of which have been upheld against the argument of unconstitutionality on the ground of "class legislation." It is not necessary here to inquire into the differences between the old Clayton Act and the present Norris-La Guardia Act. Suffice it to say that every decision, in-

cluding the decisions of this Court, upholding the constitutionality of the older act, are authorities directly in point for the proposition that anti-injunction legislation in labor disputes is not unconstitutional as denying to the employers or others the equal protection of the laws. (See **Greenfield v. Central Labor Council**, 104 Or. 236.)

Before closing this discussion we should like to refer briefly to the opinions of the Justices of the New Hampshire and Massachusetts courts, which are cited by the appellant in his brief at pages 38 and 39. Those decisions were advisory opinions only and no briefs or arguments were before the Court. They did not have the effect of *stare decisis*. In any event, neither case holds every provision of the Norris-La Guardia Act as state legislation unconstitutional, but only that in the opinion of the Justices certain provisions thereof were bad. **Neither case dealt with the sections of the Act particularly applicable to the facts of this case.** For example, the Massachusetts Court held the Act unconstitutional largely because of the provision with regard to "yellow dog" contracts on the authority of the **Adair** and **Coppage cases.** Both cases relied to a great extent upon the doctrine of inherent power of the courts, which is not applicable in the instant case, as already pointed out. It is also interesting to note that in 1935 Massachusetts passed the Norris-La Guardia Act, leaving out only the "yellow dog" contract provision (see Massachusetts Laws 1935, chapter 407), thus demonstrating that the Legislature of Massachusetts did not consider that advisory opinion as holding unconstitutional the provisions of the Act applicable in the case now before the Court.

III.

THE WISCONSIN LABOR CODE, IN SO FAR AS IT AFFECTS THE ISSUES IN THIS CASE, DOES NOT CHANGE THE LAW RELATING TO LABOR DISPUTES, WHICH LAW WAS IN EXISTENCE PRIOR TO THE ENACTMENT, AND THE LAW PRIOR TO ITS ENACTMENT WAS THE SAME AS IT WAS HELD TO BE IN THE INSTANT CASE BY THE WISCONSIN SUPREME COURT.

We do not wish to unduly burden this Court with an extended discussion of cases dealing with the rights of working men to organize and to pursue peacefully the objects for which they organized. That subject is taken up to a considerable degree under point I of this brief. We do, however, wish to point out to the Court that not only was the statutory enactment of the Wisconsin Labor Code a legitimate exercise of the police power of the State Legislature in its recognition of fundamental concepts relating to the relationship of employer and employee, but also that this enactment was a recognition of such rights and privileges on behalf of working men as existed prior to the enactment of the statute. More specifically we direct the Court's attention to those cases which arrived at the same conclusion as the Wisconsin Supreme Court did in the instant case concerning a dispute between employers and organizations composed of employees engaged in the same trade, craft or industry. The cases of **Exchange Bakeries v. Rifkin**, supra, and **Clark Lunch Company v. Local 106**, supra, dealing with this point, have already been discussed in this brief, as has been the case of **American Steel Foundries Company v. Tri-City Central Trades Council**. In addition to those cases, we cite the case of **United**

Chain Theatres Company v. Philadelphia M. P. M. O. Union (Pa.), 50 Fed. (2d) 189, wherein the Court was called upon to deal with the same situation, that is, picketing plaintiff's place of business by union men who were not employees of that employer. In refusing to restrain such picketing by the issuance of an injunction, the Federal Court said:

"• • • A man's business is, generally speaking, entitled to the same protection by law as any other kind of property; but where injury to business occurs or is threatened in the course of one of the conflicts generally accepted as necessarily incident to economic and social progress, the law may, under certain circumstances, permit the injury and withhold the remedy. Whether it will or not depends ultimately upon public policy, but the method of determining each particular case usually takes the form of an inquiry **whether the acts causing or threatening the injury are for a justifiable purpose.**

"Where the conflict is between employee and employers, self-interest is generally accepted by the law as a justification for acts by employees, injurious to the employer's business."

• • • • • • •

"In the case at hand, however, these defendants are directly and immediately interested in employment at the plaintiff's theaters; they want the jobs for their own members, and they want them at the wages and under the restrictions established by the regular union contract which is in force in most of the theaters in Philadelphia. It is quite true that the important effort here is to unionize the plaintiff's business, but more than in the ordinary case, **this is only an intermediate step in obtaining what is really desired, namely, employment for union men at union wages, and on union terms. While no member of the defend-**

ant union is now actually seeking employment in the plaintiff's theaters, some of them have been employed there, and **each one of them is a potential employee.** Thus the union has much more than a remote interest in the plaintiff's relations with employers."

• • • • • • •

"The conclusion that the defendant's course of conduct was justified by its purpose means simply that the bare fact of injury to the plaintiff's business, caused incidentally by the defendants, will not, under the circumstances of this case, entitle the plaintiff to relief. It still remains to consider the means adopted by the defendants."

Likewise, in the case of **Blumauer v. Local Union No. 159,** 141 Ore. 399, a case where no dispute existed between the employer and his immediate employees, the Court upheld the right of union to picket the employer's place of business, and the following rule was announced:

"This right of presenting its side of the controversy, organized labor may exercise by lawful means in a lawful manner when its members have reasonable ground to apprehend that the practices or pay of any employer will produce an injurious effect on the working conditions of employees generally, or of those in a particular trade or calling, even though there be no direct controversy between the employer and his immediate employees."

See, also **Great Northern Railway Company v. Brossaue,** 286 Fed. 414, and **Bayonne Textile Corporation v. American Federation of Soap Workers,** 116 N. J. Eq. 146, 176 Atl. 551.

It can thus be seen that the code in legalizing certain acts under certain circumstances merely follows what was

considered the best law always. It is a full recognition of the rights of working men and the controversies which arise between them and employers which are peculiar to these particular groups and which are so unalterably tied up with the peace, welfare and morals of society that the courts and the Legislatures have developed a special technique in dealing with such legislation.

The point we herein make is also pertinent on the question of jurisdiction. It was not necessary to a determination of the issues in the instant case for the Court to refer to the Wisconsin Labor Code for guidance. This decision of the Court is not based entirely upon the code, but rather it is based upon the common law as it existed prior to the code. Referring to the decision, it can be seen that there is no reference made to the Wisconsin Labor Code, except as such reference might be considered to be made inferentially in the references made to the American Furniture Company case.

IV.

DISCUSSION OF THE DISSENTING OPINION BY MR. JUSTICE FOWLER IN THE INSTANT CASE.

The appellant has placed great reliance on the dissenting opinion of Mr. Justice Fowler.

Counsel for the respondents has a very high regard for the dissenting opinions of courts of last resort. These dissenting opinions are valuable in that whenever in the future it becomes necessary to deal with controversies similar to those already adjudicated, such opinions enable one to fully appreciate the particular problem which was at that time discussed, and by comparing the majority and minority opinions, enable one to approach the question taking into full consideration the varying analyses that

have been made of such problems. This is certainly true in cases dealing with socio-economic problems.

Because appellant bases his position to quite a degree on the dissent we are impelled to discuss quite freely the minority opinion of Mr. Justice Fowler.

The minority opinion points out that if the appellant cannot do business as a contractor under the proposed contract and thereby gives up his business as a contractor "his opportunity to work at his trade as a layer of tile would be diminished and destroyed because of exclusion from membership in the defendant union because he has not served three years as an apprentice under a journeyman tile layer." Surely that does not render the conduct of the respondents illegal. They are in no manner obliged to guarantee him the right to do business as a contractor upon terms and conditions that he can fulfill. Even the state is not obliged to do that. Thousands of persons would like to go into business, but for some reason or other, through lack of capital, the high cost of material, the high cost of labor, the inability to compete with union shops, etc., they are prevented from going into the business of contractor or successfully continuing in the business. Is the situation any different than if appellant were unable to pay the wages set forth in the contract and therefore had to go out of business? The fact that he has to go out of business or is unable to continue in it as a union contractor has nothing to do with his ability or inability to join a union or with the apprenticeship feature. If he seeks an opportunity to work at the trade he must face that proposition, and the opportunity and lack of opportunity, in the same manner as any other person faces it who desires to work as a tile layer. There is nothing to prevent him finding employment as a nonunion tile layer if he prefers to work in that capacity; and if he cannot find

work certainly the respondents are not responsible for that any more than they are responsible for the inability of their own members to find work. The testimony shows that there are many of them without work and on relief.

If he wishes to work as a union tile layer he is obliged to fulfill the rules prescribed by the union for those who are members and those who seek membership in the union. If a union member is required to serve an apprenticeship before he attains the status of journeyman, appellant is obliged to serve the apprenticeship before he secures that status.

But when the minority opinion launches off into the personal view that "it is nonsense to claim that three years of such apprenticeship is necessary to enable a competent plasterer to lay tile" it exhibits a total failure to recognize the deep and intense social and economic implications involved in the apprenticeship requirement.

The characterization of this requirement as "nonsense" and "unreasonable" is an assumption on the part of the minority that they know better how the industry should be regulated than those in the industry. It seems to us that after years of negotiations between union workers and union employers, and the fixing of terms and conditions best suited to the industry, it is not the province nor function of courts to tell the industry what rules are best suited for it. We think the courts should leave the determination of these terms and conditions to those who are best informed and most able to do it, since there is nothing on the face of the requirement that one serve an apprenticeship before he is given the status of journeyman that is unusual or so outlandish as to shock one's conscience.

In fact, the three-year term of apprenticeship in any of the skilled crafts in the building trades has been a requirement for over half a century. Those who know some-

thing of the apprenticeship history know that there is more than the element of acquisition of skill in the apprenticeship rule. In fact, it is so vast and so all-important that one could very well spend fifty or more pages in an explanation of the subject.

The regulation of apprenticeship goes to the very heart of the regulation of employment, and often gives rise to considerable controversy between employer and employees. Every craftsman is desirous of maintaining his standard of wages. Every craftsman knows that a fair standard of wages can only be maintained in the event the craft is not flooded or over-supplied with workers. Every one knows that there should be some regulation of supply and demand for craftsmen in the industry. The apprenticeship rule is one of the most potent factors in regulating this feature of employment, and conserving standards of wages.

Several years ago this writer was counsel in a bitter labor controversy in Wisconsin. A large hosiery concern had decided that it would install new machinery requiring but one knitter to operate two machines at the same time, whereas each knitter formerly operated one. In order to facilitate the knitter in his operation of the two machines he was to be given two apprentices, thus making three persons—a skilled knitter and two apprentices to each machine. It was apparent to the knitters that before long the two apprentices would be full-fledged knitters; that there would be an over-supply of skilled labor, and that the wages of the knitters would be greatly reduced. The knitters went on strike, and it was an intense and bitter struggle to prevent the installation of the rule requiring a knitter to attend to two machines with the aid of two apprentices.

If before declaring the apprenticeship rule to be "nonsense" and "unreasonable" an examination of labor his-

tory were made, we doubt whether the minority would, with that curt wave of the hand, so characterize the rule with such assurance and certainty.

One of the greatest controversies in all history of labor centered around the apprenticeship rule. As far back as Queen Elizabeth's time Parliament passed regulatory apprenticeship laws to regulate the supply of labor and to maintain living wage standards. Webb, on the "History of Trade Unionism" (p. 42 and ff.), published by Longmans, Green and Co., in 1911, records the facts:

> "• • • But by the celebrated 'Statute of Apprentices' the statesmen of the time contrived arrangements which would, as they hoped, 'yield unto the hired person, both in the time of scarcity and in the time of plenty, a convenient proportion of wages.' Every year the justices of each locality were to meet, 'and calling unto them such discrete and grave persons • • • as they shall think meet, and conferring together respecting the plenty or scarcity of the time,' were to fix the wages of practically every kind of labour, their decisions being enforceable by heavy penalties. Stringent regulations as to the necessity of apprenticeship, the length of its term, and the number of apprentices to be taken by each employer, received the confirmation of law. The typical ordinances of the medieval gild were, in fact, enacted in minute detail in a comprehensive general statute applying to the greater part of the industry of the period (p. 42).
>
> "• • • We gather from the employers' complaints that the main preoccupation of the federation was the strict enforcement of the law limiting the number of apprentices which each master might take. This caused the leading master hatters to promote, in 1777, a bill to remove the limitation. Against them was marshaled the whole strength of the journeymen's organization • • •" (p. 46).

Then follows a historical review of apprenticeship laws, and this significant paragraph:

"• • • The original 'case' which the journeymen curriers submitted to counsel in 1810 (fee two guineas), with a view to putting in force the Statute of Apprentices, is in our possession, together with the somewhat hesitating opinion of the legal adviser. **In a few cases proceedings were even taken against employers for having set up in trades to which they had not themselves served their time.** • • • There was nothing for it then but either to abandon the line of attack or to petition Parliament to make effective the still unrepealed laws. This they accordingly did, with the unexpected result that the 'pernicious' law empowering justices to fix wages was in 1813 peremptorily repealed. (Emphasis ours.) (Page 53.)

"• • • The repeal of the wages' clauses of the statute made this emphatic declaration of the new doctrine law as far as the fixing of wages was concerned; but there remained the apprenticeship clauses. Petitions for the enforcement of these, and their extension to the new trades, kept pouring in • • • (page 54).

"• • • The 'Masters and Journeymen of Westminster' were heard by counsel against this measure, but the House had made up its mind in favour of the manufacturers, and by the Act of 54 Geo. III, c. 96, swept away the apprenticeship clauses of the statute, and with them practically the last remnant of that legislative protection of the Standard of Life which survived from the Middle Ages. The triumphant manufacturers presented Serjeant Onslow with several pieces of plate for his championship of commercial liberty" (page 55).

This commences with 1688. The history indicates that throughout the years until the present day the subject

of the regulation of apprenticeship has been a matter of great importance with guilds, trade unions and Parliamentary bodies. Just as the English Justices made a bad mess of the subject of regulating apprenticeship we most respectfully urge that our Wisconsin Justices would have made an equally bad mess if they had endeavored to regulate the apprenticeship rule by their own ideas of what is sense and reasonable.

The minority opinion then proceeds to discuss the constitutional question and asserts, "I wish to say further that in the instant case, however it may be in the **American Furniture Co.** case, supra, the picketing involved in my opinion deprives the plaintiff of liberty and property without due process of law." This subject has been quite fully discussed in the briefs of the parties to this case, and discussed and adjudicated in the majority opinion. If the picketing is illegal in the case at bar because it deprives the appellant of liberty and property without due process of law, it is illegal in the **American Furniture Company** case and illegal in every case of a labor dispute. The majority opinion points out that here is a lawful labor dispute, though recognizing that injury is inflicted upon appellant, consequently "the injury resulting to the plaintiff from it (picketing) is effected through due process of law." Applying the quoted language of the various cases referred to in the minority opinion, it would prohibit all picketing as illegal when it interfered with the rights of any worker to follow his employment, even when the picketing was in furtherance of a strike. Thus an employee satisfied with his wages and desiring to work for the employer at low wages, even though fellow employees are on strike for higher wages, would be in a position to restrain picketing as an unlawful interference with his absolute right to work at whatever wages he is satis-

fied to work for. We are aware that there are decisions to that effect, but they are based on the definite position that all picketing under any circumstances is illegal. We shall, in a subsequent portion of this discussion, point out that the minority opinion inferentially subscribes to that doctrine, a doctrine overwhelmingly opposed and repudiated by the large majority of courts in the country, and expressly repudiated by both the Clayton Act and the Labor Code.

The minority opinion proceeds to analyze the economic situation of the appellant and his status in society, and then we are told that he cannot make a living laying tile as a journeyman without membership in the respondent union, and that is denied him because he has not served three years as an apprentice tile layer; that if the picketing continues he will not be able to earn a living, his business may be destroyed "with resulting liability imposed upon the public for the support of himself and family, with resulting loss to the public of the benefit of his services as a tile layer, denial to the public of the benefit of his competition * * *."

That is a definite analysis of the economic situation of appellant, and we agree that it is correct. **But fortunate or unfortunate as the situation is to appellant it does not create legal rights in him which would abrogate the legal rights the law accords respondents.** The exercise of his rights may drive them to the condition he claims he does not want to be driven to. We are rather struck by this energetic appeal, not because of the legal principles urged, but because of its social implications. What strikes us is that the courts do not find constitutional inhibitions when practices leading to similar results are indulged in by employers. It is commonly known that there exists as a policy in hundreds of plants in this state and in the coun-

try that persons beyond 45 years of age will not be employed. Read any edition of the "want ad" column of a metropolitan newspaper, particularly the Sunday edition. We know of no decision ever advanced that these employers have not the right to carry out that policy though hundreds of men are thereby denied employment, their labor power effectively destroyed, they are thrown onto relief and society is burdened with their care. We know, too, that through technological changes in industry the same result is accomplished. As testified to before the United States Senate Committee on Education and Labor in 1929:

> "Seven men now do the work which formerly required sixty to perform in casting pig iron; two men now do the work which formerly required 128 in loading pig iron; one man replaces forty-two in operating open-hearth furnaces. A brick-making machine in Chicago makes 40,000 bricks per hour; it formerly took one man eight hours to make 450. The most up-to-date bottle making machine makes in one hour what forty-one workers used to make by hand in the manufacture of four-ounce prescription bottles."

And this is true in every trade or industry. The employers seek the adoption of machinery as labor-saving devices so that more might be produced at less cost, and this by employers who are interested in showing stock dividends first instead of a large number of employees on the pay roll.

The foregoing policy on the part of American employers is well described in an editorial we have before us in the April, 1930, issue of Forbes, a business men's magazine:

> "Business is business. The objective of industry is to make money. We concentrate solely on that aim.

If we are satisfied that a billion-dollar merger will mean greater profits, we go ahead and engineer it.

"One of the easiest ways to cut down expenses being to cut down salary and wage rolls, we of course lay men off right and left. If elderly workers have become less nimble because of their long years of service, they are the logical ones to be dropped first. Naturally, the greater resources at the command of the enlarged combinations are unstintedly used to acquire the very latest labor-saving machinery, enabling us to dismiss still more wage earners.

"In our eyes the most valuable executive is the one who can produce the most with the least amount of labor—the smallest number of workers and the smallest pay roll. Our up-to-the-minute methods make it feasible for us to dispense with enormous numbers of workers—it is not uncommon for us to install one machine which enables half a dozen men to do what formerly took half a hundred or even a hundred men.

"Yes, we know that through our creation of gigantic enterprises—manufacturing, distributing, retailing, and every other kind—and through our vast expenditures on research, on invention, on machinery, we have caused grave dislocation of employment; but instead of being criticized for all this technological unemployment, we should be commended, since it is conclusive proof of our mastery of the science of management. What happens to all the hordes of workers we release is not our concern. Our responsibility begins and ends with running our business with surpassing efficiency, which means with a minimum of human labor.

"No, the unemployment thus created does not enter in any way into our calculations. Our bounden duty is to exercise every ounce of ingenuity we possess to do away with jobs, not to create them. Our objective is money, more and more money, not more and more men, but fewer and fewer men.

"We are much too engrossed in increasing profits to give a thought to what happens because of our

reducing the number of workers. How to take care of unemployment is a problem for others to solve. Let George do that. • • • We haven't the time to bother with it. It isn't our worry."

Is there any law that holds it unconstitutional for an employer to move his business from one state to another because he does not wish to meet improved standards in employment relations? In the City of Beaver Dam, Wisconsin, an employer closed down his plant and threw several hundred persons out of employment because a number of his employees wanted the same working conditions as prevailed in other plants in the industry in the state. Yes, nowhere can we find any legal protection for the men who were thus thrown out of employment.

In the City of Milwaukee a number of shoe manufacturing concerns moved out of the city to smaller communities where they could get cheap labor and at standards much lower than those which prevailed in Milwaukee. Hundreds were thrown out of employment, yet we know of no law that protected these workers in the destruction of their employment. We know of no judicial pronouncement that would protect these employees under "the sacred right to labor."

We ask, has any court said that this method of doing business is unconstitutional because hundreds of men are thrown out of employment and onto relief? Has any court said that this mass production by new devices displacing man power, curtailing wages and thereby the ability to purchase, leading to an economic breakdown, is illegal? We have searched in vain for a decision that has held these practices, throwing men out of jobs, destroying their earning power by employers, to be unconstitutional, and yet we find in the minority decision an economic analysis as the basis for holding the conduct of respondents un-

constitutional, although **all the respondents are trying to do is to preserve for themselves in this era of competition a decent livelihood, and the continuation of their jobs. The appellant's methods are as destructive of their livelihood as he claims theirs are of his. And in this economic struggle the Legislature has said their methods are as lawful as his.**

The minority opinion goes on to say that "* * * it is the expressed purpose of the defendants to apply the restriction that it would place upon the plaintiff to all journeymen tile layers who shall aspire to become contractors * * *." We reply that it is perfectly lawful for the respondents to apply these restrictions, even though they result in preventing journeymen tile layers from fulfilling their aspirations of becoming contractors if they aspire to do so as nonunion contractors, bidding on contracts at low wages and long hours, working in competition with their journeymen employees, if doing business on that basis is harmful to the living standard of respondents.

The concluding plea is that the conduct of the respondents will be attended "with resulting imposition upon the public of a monopoly of the tile laying business in the hands of members of the defendant union." We have yet to have pointed out to us a case where a union having succeeded in completely organizing an industry upon fair wage standards and working conditions, that this has been held to be an unlawful monopoly in restraint of trade. If this were unlawful monopoly, then a union's efforts to secure complete unionization by any means, even the mere acceptance as members of all workers in the craft, would be illegal. On the monopoly theory any efforts in furtherance of complete unionization would be illegal. The law never intended that unions shall abstain from their efforts at securing fair wages and standard working condi-

tions by endeavoring to unionize an entire industry simply because some contractors would have to go out of business because of their inability to meet the prescribed union standards. It is true that many businesses, such as tile laying, ordinarily start with small beginnings, and if successful gradually extend to more considerable proportions, but this does not provide a legal guarantee that the small contractors can flood the marke in a cut-throat, wild-cat, competitive effort to work up to considerable proportions if in doing so they must trample under foot those who have attained decent business standards and whose workers are secured with fair living conditions. There is no guarantee that his path shall not be blocked if it is a path of low wages, long hours, competition by the contractor with journeymen, etc.

The trend of the law is all the other way. Fair practices in business is the order of the day. We have adopted a law fixing the price to be paid for milk and the price for which milk may be sold, and these enactments have been held not to be invalid.

In the main portion of this brief we have discussed the **Roraback, Hughes, Parker Paint and Wall Paper Company** cases, and shown that the cases are inapplicable, and that they are decisions prior to the code which extends the scope of what was formerly labor disputes.

The astounding declaration that by virtue of being picketed "the plaintiff is no more free so to work in the face of the threat of destruction of his business and deprivation of his means of livelihood by continued and incessant picketing than he would be in the face of a threat 'to beat him up' every time he took a contract for tiling" is a reversion to a doctrine that we had thought has long since been buried. How can the dissenting opinion liken peaceful picketing to physical violence? Can it

be that the minority opinion does not see any distinction between a peaceful picket line and physical violence? **Picketing involves an appeal to the public and to workers, violence is not appeal.** Is it possible that the legislative declaration on this subject is no guide as to its lawfulness? The holding that peaceful picketing is equivalent to beating up the employer must be judged on the basis of picketing as **picketing** and not by applying it to the particular dispute. We readily concede that if there is no labor dispute peaceful picketing should be enjoined, not because it is equivalent to physical violence, but because it works an injury upon another without legal cause. But the fact that there is legal cause and there is a lawful labor dispute does not change the character of the act of picketing. If the picket line is equivalent to violence it is so then in a lawful strike, and thus the minority opinion aligns itself with those discredited decisions which prohibit all picketing on the basis that it is illegal. It subscribes to that doctrine so clearly enunciated in the case of **Atchison T. S. F. Ry. Co. v. Gee et al.**, 139 Fed. 582 (1905), "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity or peaceful mobbing or lawful lynching."

And may we say parenthetically that we find no expression in the dissenting opinion which infers that picketing is lawful under any circumstances, not even in the instance of a strike. We find the rather guarded reservation in the following expression: "As to peaceful picketing declared lawful by the Code, whether or not it may be declared lawful in furtherance of a strike of employees * * *." We do not believe that the statement, "No court has ever yet squarely held that picketing, peaceful or otherwise, is lawful except in aid of a strike" is the fact. If we did not wish to burden this brief with numbers of citations run-

ning over many years we would set forth excerpts from a number of them. Courts such as the California courts hold the secondary boycott to be legal and to permit picketing in aid of a boycott though no strike existed at the establishment picketed. A lockout is not a strike; it is a labor controversy, and the volumes of law contain dozens of cases to the effect that picketing in opposition to a lockout is legal. But one need go no further than the case referred to by the minority opinion. **Exchange Bakery and Restaurant Co. v. Rifkin, 245 N. Y. 260.** The Court says this case "does hold, in effect, that peaceful picketing in aid of a strike is lawful." This case holds with equal force and just as squarely that peaceful picketing not in aid of a strike is lawful: **"Picketing without a strike is no more unlawful than a strike without picketing."** We don't know what language can be used to hold more squarely the proposition the minority opinion says no court has held. See also **Nann v. Raimist,** 255 N. Y. 307, 147 N. E. 690, and **Wise Shoe Co., Inc., v. Retail Shoe Salesmen's Union,** 266 N. Y. 264, neither of which are strike cases.

The minority opinion asserts "that peaceful picketing is not made lawful in every controversy growing out of a labor dispute by the declaration of the code may, we think, be clearly shown by a few hypothetical cases."

Whether the above is a correct statement of law, the hypothetical cases certainly do not support or prove the foregoing contention. The illustration of the WPA strike is a forceful example of a real labor dispute within the code entitling those engaged in it to exert economic pressure in furtherance of it. The workers of the WPA are on strike for an increased wage. There is nothing in the law which prohibits that. They come to the capitol city in a "great horde." If they come peacefully and comport themselves orderly they have a right to come in great num-

bers whether they are called a "horde" or a group of striking workers. Their demand of the state administrator that he increase their wages is not a demand upon him to grant the increase out of his personal funds. Even workers understand that their appeal to him must be relayed to others; but they also understand that the Government is made up of numbers of officials; that he, as administrator, is directly in charge over them; that in appealing to him they are appealing to the particular officer of the Government designated to have contact with them; that in picketing him they are picketing their employer, and that he in turn will make known their appeal, their petition, their economic persuasion in furtherance of it, so that they may gain their increase in wages.

Just what difference is there in picketing a WPA administrator because he personally cannot comply with the wage demands with the workers than there is in picketing the manager's office of an A. & P. store, who likewise cannot grant a demand of employees for increased wages, but must secure the authority from other executives in New York or elsewhere?

The illustration points out that they make a like demand upon the Governor, and he, too, "is powerless to meet their demand." In the case of the Governor the facts should indicate whether he stands in the relationship to the workers of administering the department to which they are attached and whether he has any control over the workers whatsoever. It may well be that the Governor has no more official connection with the WPA than has an alderman. It may also be, as was the fact in Wisconsin in 1931 and 1932, when the building of overhead viaducts and bridges was in progress, that the Governor was empowered to fix the rate of pay for workers in that employment. If the Governor is in this position he then is in the same posi-

tion as the administrator of the WPA. We contend that by every test of what constitutes a labor dispute under the circumstances outlined, there exists here a labor dispute with the right to picket in furtherance of it.

Courts have time and again restrained pickets engaged in a lawful labor dispute from blocking entrances of private concerns. We concede that pickets would have no right to enter the business offices of a picketed concern, or the factory of such business, or the store premises of a storekeeper with whom they are in dispute, and carry on their picketing inside the establishment. But suppose the pickets carried their truthful signs respecting the Governor outside of the capitol building on the public sidewalks, orderly, peaceful, not blocking the sidewalks, permitting all persons egress and ingress to the capitol building, we emphatically contend that such picketing is lawful in furtherance of their labor dispute.

We have treated the foregoing in the light of the Court's question and confined it to the matter of a labor dispute. But something else occurs to us in connection with the right to picket the WPA administrator and the Governor, and that is the Constitution of the state, Article I, Section 4: "**Peaceable assembly and petition.** The right of the people peaceably to assemble, to consult for the common good, and to petition the Government **or any department thereof** shall never be abridged."

We rather think that the conduct described in the minority opinion under the circumstances would come within the rights of the aggrieved workers under the above-quoted provision of the Constitution. Their picketing is a form of peaceable assemblage and a form of petitioning the Government and its department, the WPA. Petitioning the Government is not necessarily required to be done upon rolls of parchment or paper. We do not know

why the carrying of a sign with a truthful statement on it is not a proper petition. It may be a more effective one than paper ones, but we know of no reason which requires that the petition shall not be in the most effective form possible, if peaceful.

But when we come to the illustration of the case of Mrs. Blank, we most respectfully assert that it is not warranted by any conception of law with or without the code. The minority opinion concedes there is a labor dispute. That being so, it affords the strongest and most classical example of the right to picket in furtherance of it. We are somewhat shocked at the social implications contained in the proposition rather than the holding that picketing in furtherance of it is not lawful.

The minority opinion holds that it is illegal to subject Mrs. Blank and her husband to the "annoyance and nuisance" of peaceful picketing if she wants to pay and can only pay $3.00 a week to a domestic and the domestic is willing to work for such sum. If Mrs. Blank's inability to pay more, and the desire of the domestic to render the service for the wage offered is the criterion upon which the legality or illegality is to be determined, then why not apply the same test to the small storekeeper, to the small factory owner, and even to the larger one? Why shouldn't Mr. Ford be permitted to pay his workers $3.00 a week if that is all he can pay?

Suppose Mrs. Blank is not the poor woman described in the illustration, but is the wife of a lawyer with an income of many thousands of dollars per year; that she desires help and because of the necessitous circumstances of maids seeking employment is able to secure service at $3 per week. Is she still to be free from the annoyance of picketing? But let us take the facts as given, that is,

that Mrs. Blank cannot really pay more. Is Mrs. Blank the only one to be considered? What about the maid? Is she to have no consideration? Is society or an interested union of maids to be bound by the willingness of Mrs. Blank's maid to work for $3 a week to be restrained from protest by lawful picketing? "Satisfaction" of the maid under such circumstances is not the test. The maid is a human being, wants a few of the fineries and things that the lawyer's daughter wants and has. She, too, would like to attend a movie. She, too, would like to sit down at an ice cream counter and buy a soda. She, too, may be subjected to an illness or operation and would prefer not to have it performed in a charitable institution. She, too, may come from a family of a hard-working mother with many children whose circumstances are such as to compel her to leave the home in order to reduce the number of mouths to feed, and perhaps requires her to contribute a portion of her earnings to the home, although heaven knows how she would be able to do so on $3 a week.

The circumstances which make for her willingness and desire to work for $3 a week are not the test. And let me say, it is a matter of common knowledge and actual fact that in the cities there are thousands of Mrs. Blanks employing maids at wages which are a disgrace to society, and this by persons who are able to pay far more than is being paid. It is not a problem of one maid, but of the welfare of thousands of maids.

But labor believes that the consideration of the maid comes before a consideration of Mrs. Blank. The illustration propounded implies that Mrs. Blank is to be considered first. We do not deny that as a personal proposition citizens are entitled to these views. But so is labor

entitled to the opposite view, and the Legislature has the right to settle the question for the public welfare.

The $3 idea is parallel with the present trouble in Arkansas, where the share-croppers protested against a wage of 75 cents per day. The workers organized a union to secure an increased wage; the employers, with the aid of the police, tarred and feathered the organizers, after which they declared they are now free from trouble and have the workers in the situation of begging for jobs at that rate.

The social philosophy of the minority opinion is in conflict with modern social concepts. It is suitable to the days of the simple tool, but not to present industry, with its complex machine and mass production. A new America has arisen. Even the economics of unionism are being forced to change. The craft is considered by a good many as antiquated and industrial unionism is fostered. We must make progress and "no Canute can stay it."

Mr. Chief Justice Rosenberry, of the Wisconsin Supreme Court, in his article, "Law and the Changing Order," printed in the September, 1924, issue of the North American Review, clearly states the social and economic factors which should govern the social concepts arising out of the implications of the illustration contained in the minority opinion:

> "• • • While many of the leaders of political and social thought have quite clearly recognized the fundamental character of the trend of our time, it is only dimly apprehended by the great mass of our people. It may be said without disparagement that some of those whose apprehensions are quite dim, occasionally find their way into legislative bodies and into public offices. There they endeavor to force a complex industrial society into the legal and social traditions

applicable to a rural agricultural society. To be wholly frank, it must also be said that many industrial managers have not yet realized the change in relationship and still regard their business as having no other than a private significance.

• • • • • • •

"It cannot be truthfully said that all lawyers, or even all judges, have perceived the fundamental nature of our problems and guided themselves accordingly. The social trend of our time is fundamental rather than superficial. We are, so to speak, turning a corner in social development. We are in the process of passing from one great tradition into another. We are endeavoring to adjust the political and social concepts of an age predominantly rural and agricultural to one which is predominantly industrial and commercial. Human relationships have been vitally altered in many ways. If industrial society is to continue on its present basis, those who have gone out of the home into the factory must there have the safeguards, the guidance and the fair share of the proceeds of industry which they formerly enjoyed as members of a small economic unit, because no form of society can long exist which does not do substantial justice to its members.

• • • • • • •

"• • • It is charged, and not without reason, that courts have in certain instances declared laws unconstitutional because they contravened the social and legal concepts of the judges rather than constitutional principles."

This argument of the minority converted into the doctrine it implies is nothing more or less than the doctrine of laissez faire. This doctrine of let things alone, while

it made the industrialists of the era during which it flourished fabulously rich and is the basis of many present individual fortunes in England and in this country, also contributed to prolonged years of misery for the great mass of industrial workers. If one wishes to inform himself of the effects of this doctrine he should read **Industry in England**, by H. de B. Gibbens (**Scribners**, Vol. VI, p. 224). There, too, the industrialist claimed inability to pay more for his labor. There were many children who had to be put to work in order to secure sustenance. They were put to work at little or no wages. Children as young as six years of age were employed in pin factories twelve and fourteen hours per day. They slept in relays, one set of children got out of bed and another set crawled into them before the beds were even cool.

No, it is not the practice upheld by the majority of the court that is "un-American, oppressive and intolerable," but, rather, the doctrine expounded by the minority. We had thought that "laissez faire" was condemned as un-American by most enlightened persons in the land.

We are told by the minority opinion that "statutory provisions restricting liberty and property of a citizen must be reasonable or they violate due process. They must bear a relation to the health, safety, good order or welfare of the public," and it is pointed out that the statute declaring peaceful picketing bears no relation to any of the foregoing. In response to this we can only say that a statute declaring peaceful picketing lawful, when in furtherance of the public policy set forth in the preamble, bears a direct relation to and promotes the welfare of the public. The intimate connection between the welfare of workers and the welfare of the public is enunciated in the **Simplex** case, *Supra 13.*

Labor does not contend that "peaceful picketing in every case is lawful." It contends that it has the right by statute to peacefully picket in furtherance of what the statute declares to be a legitimate labor dispute. As to the question whether a statute affecting one class of society to the detriment of another overbalances the disadvantage to the other, so that the welfare of the public as a whole is thereby advanced, we must leave that determination to the Legislature unless on its face the "balance" plainly contravenes the Constitution.

The practice upheld by the majority is to carry out the mandate of the Legislature which tends to discourage the process of bargaining between the employer and the individual, unorganized worker. The Code states that "In dealing with such employers, the individual unorganized worker is helpless to exercise **actual** liberty of contract and to protect his freedom of labor, and thereby obtain acceptable terms and conditions of employment." The Legislature intended to bring about an improvement in working conditions. It proclaims that through the organization of strong independent groups of wage earners decent wage levels may be secured; sweat shops will be abolished; the competition of cheap labor will be eliminated and better living standards secured. We cannot perceive how a law seeking to prevent unbridled competition in the performance of work and labor (which tends to bring down the standard of living conditions for workers) is un-American, oppressive and intolerable.

We appreciate that we have indulged in a long discussion of the dissenting opinion, but it seemed to us that this opinion, considering as it does economic and social implications in addition to law, with a number of forceful expressions of personal views, necessitated making response.

There are numerous decisions of courts throughout the land giving conservative and narrow construction to legislative enactments in favor of labor. May this not be due to a lack of understanding of the purpose of labor unions and labor unionism? We say this because, in a number of these cases, justices who have handed down decisions invalidating labor enactments did so with the statement that they are not opposed to labor unions; that they have a right to exist and foster their legitimate interest, but then proceed to destroy the advantages accruing to labor from these enactments. Mr. B. A. Green, in "The Legal Aspects of the Labor Movement," 15 **Oregon Law Review** 13 (December, 1935), describes this as follows:

> "The results could not have been different if the courts had consciously and with premeditation adopted as their guide and their belief that, 'though there may be unions, they must not be strong.'"

CONCLUSION.

Respondents respectfully submit that the instant appeal be denied, not only on the basis of the lack of jurisdiction of this Court to entertain this appeal, as set forth in our brief on that question, but also on the merits of the case and on the basis that the appellant has not been deprived of his liberty or property without due process of law, nor has he been denied the equal protection of the laws. The controversy in this case is one between employer and an organization of employees concerning conditions of employment directly affecting the wages and working hours of respondents. The inclusion by the respondents of article III in the proposed agreement and the provisions of section XX, article 6 of the union constitution are for

the sole purpose of furthering the legitimate interests of the members of the union. They are directed to the furtherance of those legitimate interests, are not actuated by malice and are not accompanied by illegal acts. Rather they are accompanied by all the peaceful means at the respondents' disposal. **The fact that because of this dispute there are resultant injuries to the employer is not sufficient for this Court to restrain the otherwise peaceful acts of the respondents, since such injuries arise out of a lawful economic dispute, and as long as the parties to that dispute do not indulge in breach of the peace or acts which are unlawful per se, the resulting injuries become** *damnum absque injuria.*

The fact that there is not an immediate relationship of employer and employee in the instant case is not controlling, since it is not claimed there is any objection on the part of the employees of the appellant to the entering into of a union contract and since the appellant himself has expressed a desire and willingness to enter into such contract, but has refused to do so because of the terms of article III of the proposed agreement. **However, and most important, the relationship of "employers" and "employees", regardless of whether or not they stand in the proximate relationship of employer to employee, and only stand in such relationship as members of the employer and employee groups within the same trade, craft or industry, has always been considered a sufficient basis at law or in equity for the recognition of the propriety and legality of peaceful acts committed in furtherance of disputes or controversies which arise out of the respective interests of such groups.** The law prior to the enactment of the Wisconsin Labor Code, and the Wisconsin Labor Code, are directed toward the peculiar class of disputes

which arise out of the right of laboring men to pursue peacefully the objects for which they organize free from judicial restraint. This Court has repeatedly reaffirmed this proposition and there is no occasion for a reversal of such view at the present time.

Respectfully submitted,

JOSEPH A. PADWAY,
Counsel for Respondents.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 658.

PAUL SENN,

Appellant,

vs.

TILE LAYERS PROTECTIVE UNION, LOCAL NO. 5, CHARLES SCHREIBER, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION and INTERNATIONAL JURIDICAL ASSOCIATION, AMICI CURIAE.

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Statement.

The appellant attempts to challenge in this Court the constitutionality of Sections 103.51 to 103.63 of the Wis-

consin Statutes (Wis. Laws, 1931, c. 376; Laws, 1935, c. 551, s. 5—herein called the Wisconsin Labor Code), as construed and applied by the Supreme Court of Wisconsin in the decision appealed from, upon the ground that these sections, as so construed and applied, contravene the Fourteenth Amendment to the Constitution of the United States. The Wisconsin Labor Code, which regulates the issuance of injunctions in labor disputes, is patterned upon the federal Norris-LaGuardia Act (c. 90, 47 Stat. 70; U. S. C., title 29, secs. 101-115) and is a counterpart of like statutes which have been enacted, in whole or in part, in fifteen other states.* This brief is filed on behalf of the American Civil Liberties Union and the International Juridical Association, organizations which have cooperated for many years in the drafting of such legislation and in seeking its enactment in Congress and in the several State legislatures.

The constitutionality of the federal Act has been sustained by two federal Circuit Courts of Appeals and by one District Court. *Levering & Garrigues* v. *Morrin*, 71 F. (2d) 284 (C. C. A. 2), cert. den. 293 U. S. 595; *United Electric Coal Companies* v. *Rice*, 80 F. (2d) 1 (C. C. A. 7), cert. den. 297 U. S. 714; *Cinderella Theatre Co.* v. *Sign Writers' Local*, 6 F. Supp. 164 (E. D., Mich.). In no case in which

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*Idaho Laws, 1933, c. 215, page 452; Ind. Acts, 1933, c. 12, page 28; La. Acts, 1934, No. 203, page 600; Me. Laws, 1933, c. 261, page 439; Md. Laws, 1935, c. 574; Mass. Acts, 1935, c. 407, amended G. L. (Ter. Ed.), 149, 214 and 220 (1935); Minn. Laws, 1933, c. 416, page 477; N. Y. Laws, 1935, c. 477, page 1051; N. D. Laws, 1935, c. 247, page 350; Ore. Laws, 1933, c. 355, page 559; Pa. Laws, 1931, c. 311, page 926; R. I. Laws, 1936, c. 2359; Utah Laws, 1933, c. 15, page 25; Wash. Laws, 1933, Sp. Sess., c. 7, page 10; Wyo. Laws, 1933, c. 37, page 31. The Washington Statute was declared in conflict with a constitutional provision of that state relating to the jurisdiction of State courts. *Blanchard* v. *Golden Age Brewing Co.*, 63 Pac. (2d) 397 (Wash.).

state legislation has been challenged upon a federal constitutional ground has the challenge prevailed. *Fenske Bros.* v. *Upholsterers,* 358 Ill. 239, 193 N. E. 112, cert. den. 295 U. S. 734; *Starr* v. *Laundry Dry Cleaning Union,* 63 Pac. (2d) 1104 (Ore.); *Local Union No. 26* v. *City of Kokomo,* 5 N. E. (2d) 624 (Ind.); *American Furniture Co.* v. *I. B. of T. C. & H. of A.,* 268 N. W. 250 (Wis.); *Dehan* v. *Hotel & Restaurant Employees,* 159 So. 637 (La.); *Aberdeen Restaurant Corp.* v. *Gottfried,* 158 Misc. 785, 285 N. Y. Supp. 832.

It is our position, however, that the question of constitutionality which the appellant seeks to raise is not before this Court and that the appeal should, therefore, be dismissed. In the event that the Court should entertain the appeal upon the merits, it is our position that the single provision of the Wisconsin Labor Code conceivably involved is not in conflict with the Fourteenth Amendment.

POINT I.

The appeal should be dismissed.

a. The Decision Below Was Based Upon Non-federal Grounds. The Federal Question, If Any, Was Not Properly Presented.

A simple and familiar question of general law was presented to the trial court. The tile layers' and helpers' unions in Milwaukee had entered into agreements with numerous building contractors in that city (R., 84) governing wages, hours and working conditions (R., 27). All such agreements included a provision preventing any employer from working as a tile layer or helper (R., 26), a provision which the trial court found was intended to protect the union members from competition with non-union tile layers and helpers (R., 28). The appellant declined to enter into such an agreement (R., 26) and the appellees patrolled his business premises with "two or four" of their members (R., 64, 40) carrying banners with

inscriptions, one stating that the appellant was "unfair to organized labor" and the other reading "Let the Union tile layer install your tile work" (R., 41). The sole question presented to the trial court was whether it was obliged to enjoin such conduct which, as it found, had been "peaceful, without violence, and without any unlawful acts" (R., 28).*

It is apparent that this question could have been decided upon principles of general law without reliance upon any statute. In *Zaat* v. *Building Trades Council*, 172 Wash. 445, 20 Pac. (2d) 589, the Court held it lawful for a union to publicize the fact that, as in the case at bar, an employer worked himself in violation of a union rule. In *Rorabeck* v. *Motion Pictures Machine Operators' Union*, 140 Minn. 481, 169 N. W. 529, a temporary injunction was denied by a trial court upon a similar state of facts and upon appeal, a majority of the court, while stating that the plaintiff might ultimately be entitled to an injunction upon proof of the facts alleged, held that "the right to and necessity for" the injunction was "not so conclusively established" as to require a reversal. In a concurring opinion, Judge Hallam specifically recognized the right of the defendants "to advise one another or the public that a certain employer does not employ union operatives or that he insists on operating his own machines." In *Hughes* v. *Motion Pictures Machine Operators' Union*, 282 Mo. 304, 221 S. W. 95, appeal dismissed, 257 U. S. 621, it was the view of three out of seven judges of the Supreme Court of Missouri that conduct similar to that herein complained of was not illegal at common law. And in *Finke* v. *Schwartz*, 28 Ohio (N. P.) 407, the court took the same view and denied an injunction.

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*The finding of the trial court that other acts complained of would not be committed or continued (R., 28, 29) is of course not here subject to review.

The record in this case shows that the case was tried and decided upon the very principles of general law applied in the authorities just cited. The trial court said (R. 24):

> "• • • the more recent trend of cases upholds the contention of the defendant that the injunction should not be issued. • • • I feel very much inclined to adopt the concurring opinion in Rorabeck vs. Motion Pictures Machine Operators' Union, cited by plaintiff. I consider that decision correctly states the rule controlling in this case."

In short, the trial court found what it considered to be "the controlling rule" in judicial doctrine and not in any statute.

The complaint in this case did not challenge the validity of any statute; the answer did not rely upon any statute to justify the conduct complained of. Nor can the appellant rely upon any assignment of error from the trial court to the Supreme Court of Wisconsin, since no assignments of error to the Wisconsin Supreme Court appear in the record. Finally, the prevailing opinion of the Supreme Court of Wisconsin makes no reference to the specific provision of the Wisconsin Labor Code which the appellant now seeks to challenge.

It is clear that the challenge here is not to a statute but to a judicial decision based upon principles of general law which have been approved by some judges and disapproved by others. But it is settled doctrine in this Court that "The due process clause does not enable this court to revise the decisions of the state courts upon questions of state law". *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 166; *Brown* v. *United States*, 159 U. S. 100, 112.

The only reference to the provisions of the Wisconsin Labor Code here sought to be questioned which was made by the Supreme Court of Wisconsin appears in its brief

statement denying appellant's petition for a rehearing. But "a statement of a state court by way of amendment of, or addition to, the record" to the effect that a federal question has been presented to it and necessarily passed upon is not controlling. *Honeyman* v. *Hanan*, 57 Sup. Ct. 350; *Powell* v. *Supervisors Brunswick Co.*, 150 U. S. 433, 440. In the case last cited, the Court said (p. 440):

> "• • • resort cannot be had to the expedient of importing into the record the legislation of the State as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon, in arriving at conclusions upon the matters actually presented and considered."

b. If It Be Argued that the Decision Below Was Based Upon a Federal Ground, We Have Shown that It Is Also Based Upon an Alternative Independent Non-federal Ground Broad Enough to Sustain the Judgment.

It is settled by decisions of this Court that, although a federal question is decided by a state court, if it also appears that its judgment was "based upon a question of general law broad enough to support the decision, this court will not consider the Federal question, though it was considered and determined by the court below adversely to the plaintiff in error." *Consolidated Turnpike Company* v. *Norfolk, etc., Ry. Co.*, 228 U. S. 596, 599; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164.

c. Even if the Decision Appealed from Had Been Based Solely Upon the Provision of the Wisconsin Labor Code Here Sought to be Questioned, the Appellant Has Failed to Show and Cannot Show that He Is Injured by this Provision.

This Court has frequently announced the rule that an appellant seeking to challenge the constitutionality of a statute has the burden of showing that he is "harmed through the operation of the statute challenged as unlawful." *Stockholders of Peoples Banking Co.* v. *Sterling*, 57 Sup. Ct. 386, 390; *In re Matter of 620 Church Street Building Corporation*, 299 U. S. 24, 27. There is nothing in this case to show that the provision of the Wisconsin Labor Code here sought to be questioned is not merely declaratory of the general law as it existed in Wisconsin prior to the statute or that the case would have been decided in appellant's favor in the absence of statute. In *Truax* v. *Corrigan*, 257 U. S. 312, discussed below, the Arizona statute complained of sought to legalize conduct which prior to the statute "was unlawful in Arizona" (257 U. S., at p. 323).

d. There Is Nothing in the Record to Show that the Appellant Is Damaged or Will Be Damaged by the Acts Complained of.

There is not a scintilla of evidence in the record to show that the appellant has lost or will lose any business or will otherwise be damaged in any property right as a result of the conduct of the appellees. In fact, the appellant testified that he "really never paid much attention to" the picketing; that he did not believe there was any picketing subsequent to December 30, 1935, the date upon which the action was instituted (R., 64). For all that appears the public may not have responded to the union campaign

and the appellant may suffer no damage whatever from the acts which the Wisconsin court refused to enjoin. This Court has frequently pointed out that "one who would strike down a state statute as violative of the Federal Constitution must show . . . that the alleged unconstitutional feature injures him". *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544, 545; *In re Matter of 620 Church Street Building Corporation*, 299 U. S. 24, 27.

e. Under Any View of the Case the Appeal Should Be Dismissed for the Want of a Substantial Federal Question. *Lukens* v. *Pennsylvania*, 290 U. S. 597 (upholding a gross-receipts tax on business of transporting freight and passengers over the highways, from which were exempted taxis and motor busses); *Rippa & Battle Co.* v. *State Industrial Board*, 291 U. S. 646 (statute providing that actual earnings of injured workmen rather than their earning capacity be made the basis for fixing compensation, as applied to a workman who had declined an offer of higher wages).

POINT II.

The only provision of the Wisconsin Labor Code conceivably involved in this appeal is not in conflict with the Fourteenth Amendment.

The Wisconsin Labor Code, enacted in 1931 for the purpose of promoting the State's public policy as to collective bargaining, is a comprehensive statute regulating the issuance of injunctions in labor disputes. Apart from the statutory declaration of public policy found in Sections 103.51 and 103.55, this case can only involve a portion of but one section of the Code—namely, Section 103.53, which provides, so far as pertinent, as follows:

> "(1) The following acts, whether performed singly or in concert, shall be legal:
>
> • • • • • •
>
> (e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof;
>
> • • • • • •
>
> (l) Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal.
>
> (2) No court, nor any judge or judges thereof, shall have jurisdiction to issue any restraining order or temporary or permanent injunction which, in specific or general terms, prohibits any person or persons from

doing, whether singly or in concert, any of the foregoing acts."*

No other provision of the Wisconsin Labor Code is before this Court, for "a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage". *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 289. No constitutional question will be decided "in advance of the necessity of deciding it". *Wilshire Oil Co.* v. *United States*, 295 U. S. 100; *Tennessee Publishing Co.* v. *American National Bank*, 299 U. S. 18, 22.

The appellant must show that "the alleged unconstitutional feature injures him". *Heald* v. *District of Columbia*, 259 U. S. 114, 123. How has this appellant been injured by the alleged unconstitutional feature? He has been denied an injunction to restrain "two or four" persons (R., 64, 40) from patrolling his office (R., 44) with banners stating in substance that he is unfair to the union (R., 41)**. Surely, such conduct is not intrinsically unlawful. It has too frequently been sustained by courts as conduct permissible regardless of the existence of a strike to justify this Court in invalidating a statute which does no more. *Exchange Bakery & Restaurant, Inc.*, v. *Rifkin*, 245 N. Y. 260, 263, 157 N. E. 130, 132; *Wise Shoe Co.* v. *Lowenthal*, 266 N. Y. 264, 194 N. E. 749; *Steffes* v. *Motion Picture*

*Section 103.56, subdivision (d), of the Wisconsin Labor Code, which requires that prior to the issuance of an injunction in a labor dispute, a finding must be made that the relief to be granted does not violate the provisions of Section 103.53, obviously does not extend the scope of the statute.

**While other acts were committed or threatened, the trial court found that such acts would not be committed or continued (R., 28, 29) and the decision of the Supreme Court of Wisconsin upholding the discretion of the trial court in this finding (R., 122) is of course binding upon this Court.

Mach. Operators Union, 136 Minn. 200, 161 N. W. 524; *Blumauer* v. *Mov. Pic. Mach. Operators' P. Union,* 141 Ore. 399, 17 Pac. (2d) 1115; *Kirmse* v. *Adler,* 311 Pa. 78, 166 Atl. 566.

Was the purpose of the union such as to render the conduct itself illegal? By this conduct the union sought to appeal to the public to refrain from patronizing the appellant while he refused to enter into a union agreement under which, as an employer, he might not work as a tile layer or helper. Convincing support for the reasonableness of the union rule is found in the record. The evidence adduced at the trial and the court's findings of fact (R., 28, 71-76) show the unemployment caused by the demoralized condition of the tile laying industry, the intense competition between union and non-union tile workers, and the understandable efforts of union workers to defend agreements and advantages obtained in respect of wages, hours and working conditions against the appellant and others who, by themselves working in the place of tile layers and helpers—and working more than the standard union day and on Sunday (R., 71)—and who, by paying their employees "considerably less than the union scale" (R., 73), were enabled to bid for work "at a lower rate than those who pay the union rate" (R., 76, 90). Surely, the union's purpose to remedy such a situation by lawful means was not illegal. Such a purpose has too much judicial sanction to permit this Court to hold that a statute which goes no further is invalid. *Zaat* v. *Building Trades Council,* 172 Wash. 445, 20 Pac. (2d) 589; *Finke* v. *Schwartz,* 28 Ohio (N. P.) 407; Hallam, J., concurring in *Rorabeck* v. *Motion Pictures Machine Operators Union,* 140 Minn. 481, 169 N. W. 529; Blair, J., dissenting in *Hughes* v. *Motion Picture Machine Operators,* 282 Mo. 304, 332, 221 S. W. 95, 122, appeal dismissed, 257 U. S. 621; compare *H. R. H. Construction Corporation* v. *Franklin,* 236 App. Div. 536, 261 N. Y. Supp. 43.

In view of the settled rule of this Court that the Fourteenth Amendment invalidates legislation only so far as "the means selected" are "unreasonable, arbitrary or capricious" and have no "real and substantial relation to the object sought to be attained" (*Nebbia* v. *New York*, 291 U. S. 502, 525), there should be little question of the constitutional support of the provision of the Wisconsin Labor Code involved in this appeal. The only possible challenge derives from *Truax* v. *Corrigan*, 257 U. S. 312.

(a) The Truax Case Does Not Govern This Case.

1. *The Truax Decision on "Due Process" Is Inapplicable.*

First. The Arizona statute invalidated in the *Truax* case legalized conduct which the Supreme Court of Arizona had declared unlawful prior to the passage of the statute. In fact, all picketing had theretofore been unlawful (257 U. S., at p. 323). In Wisconsin, on the other hand, peaceful picketing has never been rejected as a lawful and legitimate means for the protection of the right of labor to bargain collectively. Therefore, the present case, unlike the *Truax* case, could have been decided upon the *judicial* authority cited on page 4 without reference to statute.

Second. The conduct which the Arizona Court held had been legalized by the statute was conduct "the illegality" of which this Court characterized as "without doubt and fundamental" (Ibid., p. 330). There were libelous attacks and abusive epithets against the employer and his friends; libelous and disparaging statements against the plaintiff's business; threats and intimidation directed against customers and employees. This was not, *as the conduct in the case at bar was*, "lawful persuasion or inducing", "a

mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage" (Ibid., pp. 327-8); it was "an admitted tort" (Ibid., p. 337). It is understandable why this Court held that the conduct in the *Truax* case was not conduct "as to the illegality of which courts have differed and States have adopted different statutory provisions" (Ibid., p. 330). It is understandable why this Court concluded that the Arizona statute sanctioned "a wrongful and highly injurious invasion of property rights" (Ibid., p. 329). The Court said (Ibid., p. 327):

> "The real question here is, were the means used illegal? The above recital of what the defendants did, can leave no doubt of that. The libelous attacks upon the plaintiffs, their business, their employees, and their customers, and the abusive epithets applied to them were palpable wrongs."

And Mr. Justice Pitney, in his dissenting opinion, admitted (p. 346):

> "Upon the facts, it hardly could be said that defendants kept within the bounds of a 'peaceful' picket or boycott. They appear to have gone beyond mere attempts to persuade plaintiffs' customers to withdraw their patronage, and to have resorted to abusive and threatening language toward the patrons themselves."

Final proof that the *Truax* case would have been decided differently if it had merely involved conduct like that in the case at bar is the opinion of this Court rendered at the same term in *American Steel Foundries* v. *Tri-City Central Trades Council* (257 U. S. 184, 209):

> "'• • • they may use all lawful propaganda to enlarge their membership and especially among those

whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious."

2. *The Truax Decision on "Equal Protection" Is Inapplicable.*

Upon the assumption that the Arizona statute affected only the injunctive remedy, the majority held that the employer was denied the equal protection of the laws. The reason advanced was that there was withheld from the employer the use of a remedy in this type of dispute which might have been available to him in any other type of dispute—that, in short, he was entitled to the same number of remedies in a dispute no matter of what character.

First. The Wisconsin statute applies not only in a labor dispute between an employer and employees, but as well to disputes (a) between an employer and other employers and (b) between employees and other groups of employees. Wisconsin Statutes (1935), Section 103.62. It is not only the employer in a dispute with employees who may find the range of legal remedy narrowed; the same limitation governs employees in contests with other employees and employers in contests with other employers engaged in the type of dispute defined by the statute. The prototype federal statute has indeed been held applicable to a case in which the Government was the complainant. *United States* v. *Weirton Steel Co.*, 7 F. Supp. 255, 262 (D. C., Del.).

Second. As we have already pointed out, there is nothing to show that the denial, if any, of equal protection to this appellant is a denial for which a statute alone is re-

sponsible. Judicial precedent (p. 4) has arrived at the same result.

Third. The breadth given to the equal protection clause by the majority, involving as it did a guarantee that no person would have fewer remedies against one class of tort-feasors than he had against other classes, was criticized as unsupportable on principle or authority in the dissenting opinion of Mr. Justice Pitney, in which Holmes, Clarke and Brandeis, JJ. concurred (Ibid., pp. 350-351). The effect of such a rule is that no person may be unequally protected as against himself. Such a doctrine has never been reannounced in any decision of this Court. On the contrary, a recent case (*Seaboard Air Line Rwy.* v. *Watson,* 287 U. S. 86) has recognized that state legislation may properly, and consistently with the equal protection clause of the Fourteenth Amendment, subject a plaintiff to more onerous burdens in certain types of litigation than in others.

Fourth. As we shall next show, economic, industrial and legal developments since the *Truax* decision have made reasonable the classification found arbitrary and without basis by the majority in that decision.

(b) The Provision of the Wisconsin Labor Code Involved in This Case Is Not Unreasonable, Arbitrary or Capricious; It Represents a Reasonable Treatment of Acknowledged Abuses in the Use of Injunctions in Labor Disputes.

The use of the injunction in labor disputes has been a subject of bitter political debate for more than a generation. The abundant Congressional attempts between the years 1898-1914 to remedy acknowledged abuses have been summarized by Mr. Justice Brandeis. *Truax* v. *Corrigan,* 257

U. S. 321, 369. The enactment of the Clayton Act in 1914 did not end the causes of controversy. The Act proved inadequate. Popular dissatisfaction and resentment did not abate. See Frankfurter and Greene, *The Labor Injunction* (1930), ch. IV. In 1928 extensive hearings were again begun by the Senate Committee on the Judiciary (70th Congress, 1st Session, Hearings on S., 1482) and in 1932 Congress enacted, and President Hoover signed, the so-called Norris-LaGuardia Act (c. 90, 47 Stat. 70; 29 U. S. C., Sec. 101-115). This Act served as the model for state legislation enacted in whole or in part in sixteen states to meet the same mischiefs (see footnote to p. 2). What were these mischiefs?

> "The history of the labor injunction in action puts some matters beyond question. In large part, dissatisfaction and resentment are caused, first, by the refusal of courts to recognize that breaches of the peace may be redressed through criminal prosecution and civil action for damages, and, second, by the expansion of a simple, judicial device to an enveloping code of prohibited conduct, absorbing, en masse, executive and police functions and affecting the livelihood, and even lives, of multitudes. Especially those zealous for the unimpaired prestige of our courts have observed how the administration of law by decrees which through vast and vague phrases surmount law, undermines the esteem of courts upon which our reign of law depends. Not government, but 'government by injunction', characterized by the consequences of a criminal prosecution without its safeguards, has been challenged." Frankfurter and Greene, *The Labor Injunction* (1930), page 200.
>
> "In form, the labor injunction was vague and of imperilling ambiguity; in content it subjected the most conventional trade union activities to the dangers of

contempt; in result, it sometimes paralyzed the exercise of unquestioned right and sometimes incited men to violence, but uniformly it bred in masses of our people hostility to the federal courts and undermined confidence in the administration of law as even-handed justice." Frankfurter and Greene, *Congressional Power Over the Labor Injunction,* 31 Columbia Law Review 385, 404 (1931).

The complaint which has been heard so continuously in legislative halls, and to which so-called anti-injunction legislation was a response, stems from the basic contention by working men that recognition of labor's abstract right to organize necessarily implies recognition and sanction of labor's concrete right to use, among other economic measures, the appeal for public support in its controversies with employers. It is the public, labor contends, and not the courts, which should judge of the merits of its position in a specific labor dispute. So long as labor, in appealing to popular judgment, conducts itself peacefully and commits no acts intrinsically illegal, it should be free from the restraining hand of courts.

Such is the underlying assumption, not only of the legislation involved in this case, but of the corresponding legislation of other states and of the Norris-LaGuardia Act. Such is also the underlying assumption of other legislation enacted by Congress. We refer to the Railway Labor Act of 1926 (c. 347, 44 Stat. 577) and the amendments thereto of 1934 (c. 691, 48 Stat. 1185); to the Bankruptcy amendments of 1933 and 1934 (c. 204, 47 Stat. 1481, sec. 77 [p] and [q]; c. 424, 48 Stat. 922; U. S. C. title 11, sec. 207 [l] and [m]); to the Act for the coordination of interstate railroad transportation (c. 91, 48 Stat. 214; U. S. C. title 49, sec. 257 [e]); to the National Labor Relations Act (c. 372, 49 Stat. 449; U. S. C., title 29, sec. 151, *et seq.*). Each of these legislative acts flows from express recognition that

legislation which strengthens and implements labor's right to organize is vital to the public interest. Each of these legislative acts is irrefutable evidence that special legislative treatment of labor's right to organize is appropriate and well within the field of permissible classification.

And this Court has, in a unanimous opinion, sanctioned such treatment. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548. In that case labor's right to organize came into conflict with the employer's "normal exercise of the right to select its employees or to discharge them" (Ibid., p. 571). The conflict was resolved in favor of legislation which curtailed the "normal" right of the employer and gave significance to the right of labor to organize.

Nor have legislators, including the Congress of the United States, been content to leave to implication a public policy "equalizing the bargaining power of labor and leaving the determination of wages and working conditions to the play of economic forces". *American Furniture Co.* v. *I. B. of T. C. and H. of A.*, 268 N. W. 250, 262 (1936). The public policy itself has been given the force and standing of an express enactment.*

Applied to the case at bar, this public policy means that so long as the conduct of the union is not intrinsically unlawful and so long as its purpose is not malicious, a court should not intervene and judge of the economic issues by injunction. Without the support of any statute, a great Court has said:

> "If the defendant believes in good faith that the policy pursued by the plaintiff and by the shops united with the plaintiff is hostile to the interests of organized

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*U. S. C., title 29, sec. 102; Wis. Stat. (1935), 103.51, 103.55. See statutes cited in the footnote to page 2.

> labor, and is likely, if not suppressed, to lower the standards of living for workers in the trade, it has the privilege by the pressure of notoriety and persuasion to bring its own policy to triumph" (*Nann* v. *Raimist*, 255 N. Y. 307, 314, 174 N. E. 690, 693 [1931]).

The conduct in the case at bar is a peaceful patrol by two or four persons; its purpose is to acquaint the public with the fact of a labor dispute. In *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, this Court, confronted not with the more difficult question of permissible state doctrine but with the simpler question of desirable federal doctrine, said (Ibid., p. 209):

> "Union was essential to give laborers opportunity to deal on equality with their employer. • • • To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda without more, to be without excuse and malicious."

State legislation of the character here involved has now been sustained in six states (p. 3).

POINT III.

No provision of the Wisconsin Labor Code other than that directly involved in this appeal is before this Court.

The appellant in his assignments of error to this Court (R., 2) has properly attempted to challenge only the Wisconsin Labor Code as construed and applied to him in this case. That application merely involves the propriety of the peaceful patrolling of his place of business by two or four persons for the purpose of announcing to the public that he refuses to sign an agreement under which he could not work as a tile layer or helper while himself an employer. The only relevant provision of the Wisconsin Labor Code is that quoted on page 9 of this brief. That provision is clearly not so "inseparably connected" with the remainder of the labor code that it could not "operate without" it. *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 490; *Berea College* v. *Kentucky*, 211 U. S. 45, 55-56.

The intention of the Wisconsin legislature is specific as to separability. Under Section 103.63 of the Wisconsin Statutes, if any provision of the Wisconsin Labor Code "or the applications thereof to any persons or circumstances is held invalid, the remainder of these sections and the applicability of such provisions to other persons or circumstances shall not be affected thereby." While such a provision is not an "inexorable command", it "clearly evidences the intention" of the legislature "not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the Act which would render them invalid should not be indulged." *Crowell* v. *Benson*, 285 U. S. 22, 63; *Utah Power and Light Co.* v. *Pfost*, 286 U. S. 165, 184.

CONCLUSION.

The appeal should be dismissed or the judgment of the Supreme Court of Wisconsin affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 658.—October Term, 1936.

Paul Senn, Appellant,
vs.
Tile Layers Protective Union, Local No. 5, et al.
} On Appeal from the Supreme Court of Wisconsin.

[May 24, 1937.]

Mr. Justice Brandeis delivered the opinion of the Court.

This case presents the question whether the provisions of the Wisconsin Labor Code which authorize giving publicity to labor disputes, declare peaceful picketing and patrolling lawful and prohibit granting of an injunction against such conduct, violate, as here construed and applied, the due process clause or equal protection clause of the Fourteenth Amendment.

The Labor Code occupies §§ 103.51 to 103.63 of the Wisconsin Statutes, 1935 (Wis. Laws, 1931, c. 376; Laws, 1935, c. 551, § —). But only the following provisions of § 103.53 are directly involved on this appeal:

"(1) The following acts, whether performed singly or in concert, shall be legal:

. . . . . .

"(e) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, patrolling any public street or place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof."

. . . . . .

"(l) Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal.[1]

"(2) No court, nor any judge or judges thereof, shall have jurisdiction to issue any restraining order, or temporary or permanent injunction which, in specific or general terms, prohibits any person or persons from doing, whether singly or in concert, any of the foregoing acts."

[1] Subsections (h), (i) and (k) are likewise relevant to the present issue, as supplementing subsections (e) and (l), but do not require special discussion.

On December 28, 1935, Senn brought this suit in the Circuit Court of Milwaukee County, against Tile Layers Protective Union, Local No. 5, Tile Layers Helpers Union, Local No. 47, and their business agents, seeking an injunction to restrain picketing, and particularly "publishing, stating or proclaiming that the plaintiff is unfair to organized labor or to the defendant unions"; and also to restrain some other acts which have since been discontinued, and are not now material. The defendants answered; and the case was heard upon extensive evidence. The trial court found the following facts.

The journeymen tile layers at Milwaukee were, to a large extent, members of Tile Layers Protective Union, Local No. 5, and the helpers, members of Tile Layers Helpers Union, Local No. 47. Senn was engaged at Milwaukee in the tile contracting business under the name of "Paul Senn & Co., Tile Contracting." His business was a small one, conducted, in the main, from his residence, with a showroom elsewhere. He employed one or two journeymen tile layers and one or two helpers, depending upon the amount of work he had contracted to do at the time. But, working with his own hands with tools of the trade, he performed personally on the jobs much work of a character commonly done by a tile layer or a helper. Neither Senn, nor any of his employees, was at the time this suit was begun a member of either union, and neither had any contractual relations with them. Indeed, Senn could not become a member of the tile layers union, since its constitution and rules require, among other things, that a journeyman tile setter shall have acquired his practical experience through an apprenticeship of not less than three years, and Senn had not served such an apprenticeship.

For some years the tile laying industry had been in a demoralized state because of lack of building operations; and members of the union had been in competition with non-union tile layers and helpers in their effort to secure work. The tile contractors by whom members of the unions were employed had entered into collective bargaining agreements with the unions governing wages, hours and working conditions. The wages paid by the union contractors had for some time been higher than those paid by Senn to his employees.

Because of the peculiar composition of the industry, which consists of employers with small numbers of employees, the unions had

found it necessary for the protection of the individual rights of their members in the prosecution of their trade to require all employers agreeing to conduct a union shop to assent to the following provision:

"Article III. It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper but that the installation of all materials claimed by the party of the second part as listed under the caption 'Classification of Work' in this agreement, shall be done by journeymen members of Tile Layers Protective Union Local #5."

The unions endeavored to induce Senn to become a union contractor; and requested him to execute an agreement in form substantially identical with that entered into by the Milwaukee contractors who employ union men. Senn expressed a willingness to execute the agreement provided Article III was eliminated. The union declared that this was impossible; that the inclusion of the provision was essential to the unions' interests in maintaining wage standards and spreading work among their members; and, moreover, that to eliminate Article III from the contract with Senn would discriminate against existing union contractors, all of whom had signed agreements containing the Article. As the unions declared its elimination impossible, Senn refused to sign the agreement and unionize his shop. Because of his refusal, the unions picketed his place of business. The picketing was peaceful, without violence, and without any unlawful act. The evidence was that the pickets carried one banner with the inscription "P. Senn Tile Company is unfair to the Tile Layers Protective Union", another with the inscription "Let the Union tile layer install your tile work."[2]

[2] The complaint as to certain action of defendants other than the picketing was disposed of by defendants' agreement to discontinue the same, and is not now in question. It had been shown that, with a view to picketing Senn's jobs, the unions had caused his automobile to be followed from his place of business to the jobs where he and his men were working. It had also been shown that, some months earlier, the unions had sent letters to local architects and contractors requesting them not to patronize Senn because he was conducting a non-union shop and threatening to picket them if they did so; but that there had been no picketing of any architect or contractor and no such steps had been taken by the unions. Through counsel, the unions agreed: (1) that thereafter they would not pursue plaintiff's automobile from his residence to his jobs; and (2) that they would refrain from sending any further letters to architects or contractors, and would not indulge in any acts or conduct referred to in the letters theretofore sent. The court treated this agreement by counsel as disposing of the claim for relief on this ground.

The trial court denied the injunction and dismissed the bill. On the findings made, it ruled that the controversy was "a labor dispute" within the meaning of § 103.62; that the picketing, done solely in furtherance of the dispute, was "lawful" under § 103.53; that it was not unlawful for the defendants

"to advise, notify or persuade, without fraud, violence or threat thereof, any person or persons, of the existence of said labor dispute; . . .

"That the agreement submitted by the defendants to the plaintiff, setting forth terms and conditions prevailing in that portion of the industry which is unionized, is sought by the defendants for the purpose of promoting their welfare and enhancing their own interests in their trade and craft as workers in the industry.

"That Article III of said agreement is a reasonable and lawful rule adopted by the defendants out of the necessities of employment within the industry and for the protection of themselves as workers and craftsmen in the industry."

Senn appealed to the Supreme Court of the State, which affirmed the judgment of the trial court and denied a motion for rehearing, two judges dissenting. (268 N. W. 274, 872.) The case is here on appeal.

First. The defendants moved to dismiss the appeal for want of jurisdiction. They contend that the federal question presented is not substantial. And friends of the court suggest that the appeal should be dismissed because the decision below was based upon non-federal grounds, or that there was an alternative, independent non-federal ground broad enough to sustain the judgment; that the challenge here is not to a statute, but to a judicial decision based upon principles of general law which have been approved by some judges and disapproved by others;[3] and that there is nothing to show that the provisions of the Wisconsin Labor Code here questioned are not merely declaratory of the common law of Wisconsin as it existed prior to the statute. But it sufficiently appears that the provisions of the Labor Code were relied upon; that their validity under the Fourteenth Amendment was duly challenged below; and that the rulings by the state courts were based ultimately on the Labor Code. Whether the statute as construed and applied vio-

[3] Compare Zaat v. Building Trades Council, 172 Wash. 445; Borabeck v. Motion Pictures Operator's Union, 140 Minn. 481; Hughes v. Motion Pictures Machine Operator's Union, 282 Mo. 304; Fink v. Schwartz, 28 Ohio (N. P.) 407. See Thompson v. Boekhout, 291 N. Y. Supp. 572 (N. Y. App. Div.).

lates the Fourteenth Amendment presents issues never expressly passed upon by this Court. We deny the motion to dismiss.

Second. The hearings below were concerned mainly with questions of state law. Senn insisted there that the statute was no defense, because the controversy was not a "labor dispute" within the meaning of § 103.62.[4] The courts ruled that the controversy was a "labor dispute"; and that the acts done by the defendant were among those declared "lawful" by § 103.53. See also *American Furniture Co.* v. *I. B. etc. Chauffeurs etc. General Local No. 200*, 268 N. W. 250. Those issues involved the construction and application of the statute and the Constitution of the State. As to them the judgment of its highest court is conclusive. The question for our decision is whether the statute, as applied to the facts found, took Senn's liberty or property or denied him equal protection of the laws in violation of the Fourteenth Amendment. Senn does not claim broadly that the Federal Constitution prohibits a State from authorizing publicity and peaceful picketing. His claim of invalidity is rested on the fact that he refused to unionize his shop solely because the union insisted upon the retention of Article III. He contends that the right to work in his business with his own hands is a right guaranteed by the Fourteenth Amendment and that the State may not authorize unions to employ publicity and picketing to induce him to refrain from exercising it.

The unions concede that Senn, so long as he conducts a non-union shop, has the right to work with his hands and tools. He may do so, as freely as he may work his employees longer hours and at lower wages than the union rules permit. He may bid for contracts at a low figure based upon low wages and long hours. But the unions contend that, since Senn's exercise of the right to do so is harmful to the interests of their members, they may seek by legal means to induce him to agree to unionize his shop and to refrain from exercising his right to work with his own hands. The judgment of the highest court of the state establishes that both

[4] That section provides:
"The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employe, regardless of whether or not the disputants stand in the proximate relation of employer and employe".

the means employed and the end sought by the unions are legal under its law. The question for our determination is whether either the means or the end sought is forbidden by the Federal Constitution.

Third. Clearly the means which the statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment. Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. The State, may, in the exercise of its police power regulate the methods and means of publicity as well as the use of public streets. If the end sought by the unions is not forbidden by the Federal Constitution the State may authorize working men to seek to attain it by combining as pickets, just as it permits capitalists and employers to combine in other ways to attain their desired economic ends. The Legislature of Wisconsin has declared that "peaceful picketing and patrolling" on the public streets and places shall be permissible "whether engaged in singly or in numbers" provided this is done "without intimidation or coercion" and free from "fraud, violence, breach of the peace or threat thereof." The statute provides that the picketing must be peaceful; and that term as used implies not only absence of violence, but absence of any unlawful act. It precludes the intimidation of customers. It precludes any form of physical obstruction or interference with the plaintiff's business. It authorizes giving publicity to the existence of the dispute "whether by advertising, patrolling any public streets or places where any person or persons may lawfully be;" but precludes misrepresentation of the facts of the controversy. And it declares that "nothing herein shall be construed to legalize a secondary boycott." See *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 466. Inherently, the means authorized are clearly unobjectionable. In declaring such picketing permissible Wisconsin has put this means of publicity on a par with advertisements in the press.

The state courts found that the unions observed the limitations prescribed by the statute. The conduct complained of is patrol with banners by two or four pickets. Compare *American Steel Foundries* v. *Tri-City Central Trade Council*, 257 U. S. 184, 207. The picketing was peaceful. The publicity did not involve a misrepresentation of fact; nor was any claim made below that relevant facts were suppressed. Senn did not contend that it was untruth-

ful to characterize him as "unfair", if the requirement that he refrain from working with his own hands was a lawful one. He did not ask that the banners be required to carry a fuller statement of the facts. Compare *American Furniture Co.* v. *I. B. etc. Chauffeurs etc. General Local No. 200*, 222 Wis. 338, 340, 347, 268 N. W. 250, 251, 255. Moreover, it was confessedly open to Senn to disclose the facts in such manner and in such detail as he deemed desirable, and on the strength of the facts to seek the patronage of the public.

Truax v. *Corrigan*, 257 U. S. 512, is not applicable. The statute there in question was deemed to have been applied to legalize conduct which was not simply peaceful picketing, not "lawful persuasion or inducing", not "a mere appeal to the sympathetic aid of would-be customers by a simple statement of the fact of the strike and a request to withhold patronage." It consisted of libelous attacks and abusive epithets against the employer and his friends; libelous and disparaging statements against the plaintiff's business; threats and intimidation directed against customers and employees. The means employed, in other words, were deemed to constitute "an admitted tort", conduct unlawful prior to the statute challenged. See pp. 327-8, 337, 346. In the present case the only means authorized by the statute and in fact resorted to by the unions have been peaceful and accompanied by no unlawful act. It follows, that if the end sought is constitutional—if the unions may constitutionally induce Senn to agree to refrain from exercising the right to work in his business with his own hands, their acts were lawful.

Fourth. The end sought by the unions is not unconstitutional. Article III, which the unions seek to have Senn accept, was found by the state courts to be not arbitrary or capricious, but a reasonable rule "adopted by the defendants out of the necessities of employment within the industry and for the protection of themselves as workers and craftsmen in the industry." That finding is amply supported by the evidence. There is no basis for a suggestion that the unions' request that Senn refrain from working with his own hands, or their employment of picketing and publicity, was malicious; or that there was a desire to injure Senn. The sole purpose of the picketing was to acquaint the public with the facts and, by gaining its support, to induce Senn to unionize his shop. There was no effort to induce Senn to do an unlawful thing. There was

no violence, no force was applied, no molestation or interference, no coercion. There was only the persuasion incident to publicity. As the Supreme Court of Wisconsin said:

"Each of the contestants is desirous of the advantage of doing business in the community where he or they operate. He is not obligated to yield to the persuasion exercised upon him by respondents." "The respondents do not question that it is appellants' right to own his own business and earn his living in any lawful manner which he chooses to adopt. What they are doing is asserting their rights under the acts of the Legislature for the purpose of enhancing their opportunity to acquire work for themselves and those whom they represent." . . . The respondents act of peaceful picketing is a lawful form of appeal to the public to turn its patronage from appellant to the concerns in which the welfare of the members of the unions is bound up."

The unions acted, and had the right to act as they did, to protect the interests of their members against the harmful effect upon them of Senn's action. Compare *American Steel Foundries* v. *Tri-City Central Trades Council, supra,* 208, 209. Because his action was harmful, the fact that none of Senn's employees was a union member, or sought the union's aid, is immaterial.

The laws of Wisconsin, as declared by its highest court, permits unions to endeavor to induce an employer, when unionizing his shop, to agree to refrain from working in his business with his own hands—so to endeavor although none of his employees is a member of a union. Whether it was wise for the State to permit the unions to do so is a question of its public policy—not our concern. The Fourteenth Amendment does not prohibit it.

Fifth. There is nothing in the Federal Constitution which forbids unions from competing with non-union concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisements in the press, by circulars, or by his window display. Each member of the unions, as well as Senn, has the right to strive to earn his living. Senn seeks to do so through exercise of his individual skill and planning. The union members seek to do so through combination. Earning a living is dependent upon securing work; and securing work is dependent upon public favor. To win the patronage of the public each may strive by legal means. Exercising its police power, Wisconsin has declared that in a labor dispute peaceful picketing and truthful publicity are means legal for unions. It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the

method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution. Compare *Pennsylvania Railroad Co.* v. *United States Railroad Labor Board*, 261 U. S. 72.[5] It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right.

Sixth. It is contended that in prohibiting an injunction the statute denied to Senn equal protection of the laws, and *Truax* v. *Corrigan, supra*, is invoked. But the issue suggested by plaintiff does not arise. For we hold that the provisions of the Wisconsin statute which authorized the conduct of the unions are constitutional. One has no constitutional right to a "remedy" against the lawful conduct of another.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[5] The State has, of course, power to afford protection to interests of personality, such as "the right of privacy". The protection by decision or statute of such interests of personality, rests on other considerations than are here involved. See Moreland, *The Right of Privacy Today* (1931) 19 Ky. L. J. 101; Lisle, *The Right of Privacy*, id., 137; Green, *The Right of Privacy* (1932) 27 Ill. L. Rev. 237, 238.

SUPREME COURT OF THE UNITED STATES.

No. 658.—October Term, 1936.

Paul Senn, Appellant,
vs.
Tile Layers Protective Union, Local No. 5, Charles Schreiber, et al.
} Appeal from the Supreme Court of the State of Wisconsin.

[May 24, 1937.]

Mr. Justice Butler dissenting.

Plaintiff is a tile layer and has long been accustomed to work as a helper and mechanic in that trade. The question presented is whether, consistently with the due process and equal protection clauses of the Fourteenth Amendment, the State may by statute authorize or make it lawful for labor unions to adopt and carry into effect measures intended and calculated to prevent him from obtaining or doing that work. The decision just announced answers that question in the affirmative. The facts are not in controversy. Let them disclose the concrete application of the legislation now held valid.

Plaintiff lives and works in Milwaukee. Since the latter part of 1931 he has been engaged in performing small tile laying jobs. He has personally performed almost half the manual labor required. He usually employs a tile setter and helper; occasionally he has more than one of each. He has never been a member of the tile layers union. Though a competent mechanic in that trade, he is excluded from membership because he takes contracts and because he has not served the apprenticeship required by union rules. In 1935 he had about 40 jobs. His net income was $1,500 of which $750 was attributed to his own labor. The balance, constituting his profit as contractor, was not enough to support him and family.

Defendant Local No. 5 is composed of tile layers. Its membership, 112 in 1929, had fallen to 41 at the time of the trial in January, 1936. Early in 1935 it proffered to all local contractors including plaintiff a contract fixing wages, hours and the like. About half of them signed; the others did not. It contained the following: "It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helper, but that the

installation of all materials claimed by the party of the second part [Local No. 5] as listed under the caption 'Classification of Work' in this agreement, shall be done by journeymen members of Tile Layers Protective Union Local #5." Because of that provision plaintiff declined to sign. But repeatedly he declared to representatives of the union that he was willing to employ its members and to comply with its rules as to wages, hours and working conditions; he assured them that, when his business was sufficient to permit, he would refrain from manual labor, and explained that without personally working he could not now continue in business. Conceding the truth of that statement, the union nevertheless persistently declined to modify its demands.

The president of Local No. 5 testified that, if plaintiff did not sign the contract, it would do everything "to harass and put things in his way"; that it intended to announce to the world that he is a non-union contractor and on that account should not be patronized, to picket his place of business, to ascertain where he had jobs and to picket them and in that way bring pressure to bear upon him to become a union contractor, to put him in the category of a non-union contractor unless he agrees to lay aside the tools of the trade. The program so declared corresponds with what the unions had already done against him.

In July, 1935, Local No. 5 sent to all contractors and architects letters stating: "Some time ago we presented to each individual tile contractor in the city a copy of our new agreement [this refers to the one plaintiff was called on to sign] in which we specified what constitutes a bona fide contractor and who should install the work. Not having heard from some of these so called tile contractors in a given time, we beg of you to contact the list of fair contractors listed below in awarding the tile work in your building operations. If in two weeks time anyone outside this list is awarded tile work we will then picket such jobs, contractors' or architects' offices, or employ other lawful means to help us in our fight to better the conditions of our trade." Plaintiff's name was not on the list approved by the union. Therefore the letter meant that, in order to prevent him from working, the union would apply the described pressure to him, his work, the jobs of which his tile laying was a part, the contractors and the architects from whom he got work.

Commencing December 6, 1935, it put in front of his house two men carrying signs, one being: "P. Senn Tile Company [meaning the plaintiff] is unfair to the Tile Layers Protective Union", and

the other: "Let the Union tile layers install your tile work." And regularly from eight in the morning until noon and from one to four in the afternoon it carried on picketing of that sort, sometimes using four men. They refrained from speaking to plaintiff or others and committed no breach of the peace. In that sense they carried on "peaceful picketing." The union sent men in automobiles to follow plaintiff when going from his home to his work, and instructed all its members to discover where he had jobs in order to picket them.

To justify the elimination of plaintiff, counsel told the court that "because of the demoralized condition of the trade, the union decides it does not want a contractor, whether he be skilled in the trade or unskilled, to work with the tools of the trade with the men because there is not enough work to go around." And on the witness stand the president of Local No. 5 expressed the idea that, if the contractors did not work, members of the union would be taken off relief.

The trial court found the picketing peaceful and lawful; it did not pass on other acts constituting pressure put on plaintiff. But the unions themselves deemed unlawful much that they had threatened and done to coerce him. The findings say that "the defendants, by their counsel, have stated in open court that they will not pursue the automobile of the plaintiff from his place of business to his jobs; that they will refrain from sending any further letters to architects or contractors, and will not indulge in any acts or conduct referred to in said letters towards said contractors and architects." The trial court held plaintiff not entitled to relief. The supreme court affirmed. 222 Wis. 383. Following its decision in *American Furn. Co.* v. *I. B. of T. C. & H.*, 222 Wis. 338, construing § 103.62, it held that within the meaning of that section a "labor dispute" existed between plaintiff and defendants and that under § 103.53 the picketing was legal.

The clauses of the Fourteenth Amendment invoked by plaintiff are: "No State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Our decisions have made it everywhere known that these provisions forbid state action which would take from the individual the right to engage in common occupations of life, and that they assure equality of opportunity to all under like circumstances. Lest the importance or wisdom of these great declarations be forgotten or

neglected, there should be frequent recurrence to decisions of this court that expound and apply them.

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men". *Meyer* v. *Nebraska*, 262 U. S. 390, 399.

"The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' . . . I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." Concurring opinion of Mr. Justice Bradley in *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 762, approvingly quoted in *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589.

"Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money." *Coppage* v. *Kansas*, 236 U. S. 1, 14.

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendments to secure." *Truax* v. *Raich*, 239 U. S. 33, 41.

"'Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'" *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 278.

"The Fourteenth Amendment . . . undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition . . ." *Barbier* v. *Connolly*, 113 U. S. 27, 31.

"For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo.* v. *Hopkins*, 118 U.'S. 356, 370.

The legislative power of the State can only be exerted in subordination to the fundamental principles of right and justice which the guaranties of the due process and equal protection clauses of the Fourteenth Amendment are intended to preserve. Arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of rights of liberty and property is sanctioned, stripping one of all remedy, is wholly at variance with those principles. *Truax* v. *Corrigan*, 257 U. S. 312, 327.

It may be assumed that the picketing, upheld in virtue of the challenged statute, lawfully might be employed in a controversy between employer and employees for the purpose of persuading the employer to increase pay, etc., and dissuading non-union workers from displacing union members. The right of workers, parties to a labor dispute, to strike and picket peacefully to better their condition does not infringe any right of the employer. *Amer. Foundries* v. *Tri-City Council*, 257 U. S. 184, 209. *United Mine*

Workers v. *Coronado Co.*, 259 U. S. 344, 386. *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, 540, 541. *Dorchy* v. *Kansas*, 264 U. S. 286, 289. But strikes or peaceful picketing for unlawful purposes are beyond any lawful sanction. The object being unlawful, the means and end are alike condemned. *Dorchy* v. *Kansas*, 272 U. S. 306, 311. *Toledo, A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730, 737-739. And see *Truax* v. *Corrigan, supra*, 327; *Exchange Bakery & Restaurant, Inc.* v. *Rifkin*, 245 N. Y. 260, 262-263.

The object that defendants seek to attain is an unlawful one. Admittedly, it is to compel plaintiff to quit work as helper or tile layer. Their purpose is not to establish on his jobs better wages, hours, or conditions. If permitted, plaintiff would employ union men and adhere to union requirements as to pay and hours. But, solely because he works, the unions refuse to allow him to unionize and carry on his business. By picketing, the unions would prevent him working on jobs he obtained from others and so destroy that business. Then, by enforcement of their rules they would prevent him from working as a journeyman for employers approved by the union or upon any job employing union men. Adhering to the thought that there is not enough work to go around, unquestionably the union purpose is to eliminate him from all tile laying work. And highly confirmatory of that purpose is the failure of the contract proposed by the union to permit plaintiff personally to do work in the performance of jobs undertaken by him for prices based upon union rates of pay for all labor, including his own.

The principles governing competition between rival individuals seeking contracts or opportunity to work as journeymen cannot reasonably be applied in this case. Neither the union nor its members take tile laying contracts. Their interests are confined to employment of helpers and layers, their wages, hours or service, etc. The contest is not between unionized and other contractors or between one employer and another. The immediate issue is between the unions and plaintiff in respect of his right to work in the performance of his own jobs. If as to that they shall succeed, then will come the enforcement of their rules which make him ineligible to work as a journeyman. It cannot be said that, if he should be prevented from laboring as helper or layer, the work for union men to do would be increased. The unions exclude their members from jobs taken by non-union employers. About half the tile contractors are not unionized. More than 60 per cent of the

tile layers are non-union men. The value of plaintiff's labor as helper and tile layer is very small—about $750 per year. Between union members and plaintiff there is no immediate or direct competition. If under existing circumstances there ever can be any, it must come about through a chain of unpredictable events making its occurrence a mere matter of speculation. The interest of the unions in the manual labor done by plaintiff is so remote, indirect and minute that they have no standing as competitors. *Berry* v. *Donovan*, 188 Mass. 353, 358. Under the circumstances here disclosed, the conduct of the unions was arbitrary and oppressive. *Roraback* v. *Motion Picture Machine Operators Union*, 140 Minn. 481, 486. *Hughes* v. *Motion Picture Machine Operators*, 282 Mo. 304.

Moreover, the picketing was unlawful because the signs used constitute a misrepresentation of the facts. One of them declared plaintiff "unfair" to the tile layers union and, upon the basis of that statement, the other sign solicited tile work for union tile layers. There was given neither definition of the word nor any fact on which the accusation was based. By the charge made, there was implied something unjust or inequitable in his attitude toward labor unions. But there was no foundation of fact for any such accusation. There was no warrant for characterizing him as "unfair" or opposed to any legitimate purpose of the tile layers union or as unjust to union men. There is no escape from the conclusion that the unions intended by the picketing they carried on to misrepresent plaintiff in respect of his relation to, or dealing with, the tile layers union and by that means to deprive him of his occupation. The burden may not justly be held to be on him, by counter-picketing or otherwise, to refute or explain the baseless charge.

The judgment of the state court, here affirmed, violates a principle of fundamental law: That no man may be compelled to hold his life or the means of living at the mere will of others. *Yick Wo* v. *Hopkins, ubi supra*. The state statute, construed to make lawful the employment of the means here shown to deprive plaintiff of his right to work or to make lawful the picketing carried on in this case, is repugnant to the due process and equal protection clauses of the Fourteenth Amendment. *Truax* v. *Corrigan, supra*, 328.

I am of opinion that the judgment should be reversed.

Mr. Justice VAN DEVANTER, Mr. Justice MCREYNOLDS and Mr. Justice SUTHERLAND join in this dissent.